TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 106.

LESLIE G. LOOMIS AND LESLIE G. LOOMIS, Jr.,
PLAINTIFFS IN ERROR,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED MARCH 20, 1914.

(24,119)

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INDEX.

	Original.	Print
Record on appeal to court of appeals	*a*	1
Statement under rule 41	*b*	1
Order sending exceptions to appellate division in first instance	1	1
Summons	3	2
Complaint	4	3
Schedule A—Statement	11*a*	6
Answer	12	7
Clerk's minutes	18	10
Case and exceptions	21	11
Evidence for plaintiffs	22	12
Testimony of Leslie G. Loomis	22	12
Milton McMahon	50	25
Frank P. Jobes	58	29
Fred T. Snook	59	30
Frank O'Brien	61	31
Leslie G. Loomis, Jr	63	32
Joseph W. Tuttle	69	35

Judd & Detweiler (Inc.), Printers, Washington, D. C., August 20, 1915.

	Original.	Print
Testimony of John Finucane	74	37
James Hosey	77	39
John G. Flanagan	78	39
John Quinn	81	41
Frank McFarland	83	42
Frank A. Ely	85	43
Edward G. Williams	89	45
Charles Strong	91	45
W. W. Childs	95	47
Francis G. Farrell	97	49
Motion for non-suit	100	50
Evidence for defendant	105	53
Testimony of T. Clem Beck	105	53
Motions for verdict	114	57
Verdict for the plaintiffs	115	58
Order settling case	115	58
Affidavit of no opinion	116	58
Stipulation as to exhibits	117	58
Stipulation waiving certification	118	59
Plaintiffs' exhibits	119	59
Exhibit No. 3—Letter, L. G. Loomis & Son to Bert Hayden, D. F. A., Sayre, Pa., dated February 5, 1907, sending claim to defendant	119	59
No. 4—Letter, L. G. Loomis & Son to Bert Hayden, D. F. A., Sayre, Pa., dated April 6, 1907, asking for answer to letter of February 5, 1907	119	60
No. 5—Letter from Bert Hayden, D. F. A., Sayre, Pa., to L. G. Loomis & Son, Victor, N. Y., dated April 8, 1907. Subject: Grain doors furnished for various shipments	120	60
No. 6—Letter, L. G. Loomis & Son to B. Hayden, D. F. A., Sayre, Pa., dated July 12, 1907	120	60
No. 7—Letter, Bert Hayden, D. F. A., L. V. R. R. Co., to L. G. Loomis & Son, dated January 2, 1908. Subject: Outstanding claim of $170.20	121	61
No. 10—Letter, L. G. Loomis & Son to B. Hayden, D. F. A., Sayre, Pa., dated May 27, 1908, *re* claim No. 428	122	61
No. 10—Letter, B. Hayden, D. F. A., L. V. R. R. Co., to L. G. Loomis & Son, Victor, N. Y., dated June 16, 1908, *re* claim No. 428	123	61
No. 10—Letter, L. G. Loomis & Son to B. Hayden, D. F. A., Sayre, Pa., dated June 20, 1908, *re* claim No. 428	123	62

	Original.	Print
Exhibit No. 22—Lehigh Valley Railroad Company circular No. 853, *re* allowance for grain doors on grain in bulk, dated June 21, 1907	124	62
No. 23—Lehigh Valley Railroad Company circular, I. C. C. No. B-2603, to agents and connections, *re* allowance for grain doors on grain in bulk, issued February 14, 1908	126	63
No. 25—Circular of the Lehigh Valley Railroad Company, designated as tariff No. 7421, issued November 23, 1909	129	65
No. 26—Circular of the Lehigh Valley Railroad Company, designated as tariff I. C. C. No. B-4907, issued November 24, 1909	132	66
Order of appellate division	136	68
Judgment of trial court	138	69
Notice of appeal to court of appeals	140	70
Undertaking on appeal to court of appeals	141	70
Stipulation waiving certification, etc.	144	72
Remittitur from court of appeals	146	73
Order of supreme court of New York	150	74
Judgment of supreme court of New York	153	75
Petition for writ of error	155	76
Opinion of court of appeals	159	78
Dissenting opinion of Gray, J.	179	89
Assignment of errors	181	90
Bond for costs	186	92
Writ of error	190	95
Citation and admission of service	193	96
Clerk's certificate	195	96

a

Court of Appeals.

Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs-Respondents,
against
Lehigh Valley Railroad Company, Defendant-Appellant.

Appeal Book.

Kenefick, Cooke, Mitchell & Bass, Attorneys for Defendant-Appellant, 558 Ellicott Square Building, Buffalo, N. Y.

John Colmey, Attorney for Plaintiffs-Respondents, Office and P. O. Address, Canandaigua, N. Y.

b

Statement under Rule 41.

This action was begun by the service of a summons and complaint on August 18, 1909. The time to serve an answer was duly extended until the same was served upon February 3, 1910. The case was tried before Mr. Justice Benton and a jury at the Ontario trial term held in Canandaigua on February 20 and 21, 1911.

The names of the original plaintiffs are Leslie G. Loomis and Leslie G. Loomis, Jr. The name of the original defendant is Lehigh Valley Railroad Company. No change has been made in the parties since the beginning of the action. No change has been made in the attorneys for either of the parties since the beginning of this action.

KENEFICK, COOKE, MITCHELL & BASS,
Attorneys for Appellant.

558 Ellicott Square, Buffalo, N. Y.

1

Supreme Court, Ontario County.

At a Trial Term of the Supreme Court, Held in and for the County of Ontario, at the Court House in Canandaigua, in said County, on the 23d Day of February, 1911.

Present: Hon. George A. Benton, Justice Presiding.

Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs,
against
Lehigh Valley Railroad Company, Defendant.

Order Sending Exceptions to Appellate Division in First Instance.

This action having come on for trial before Honorable George A. Benton, a justice of this court and a jury at the present term of this court and the defendant having taken exception to the rulings of the court upon the trial and the defendant having moved for dismissal of the complaint herein and for the direction of a 2 verdict in defendant's favor and the court having denied defendant's said motion for a dismissal of the complaint and for a direction of a verdict in defendant's favor and the jury by direction of the court upon plaintiffs' motion having rendered a verdict in favor of the plaintiff- to each of which rulings and directions defendant having excepted

And the court having ordered that the exceptions be heard in the first instance at the Appel-ate Division, now upon motion of Kenefick, Cooke, Mitchell & Bass, attorneys for the defendant, it is

Ordered that the defendant's said exceptions be heard in the first instance by the Appellate Division of the Supreme Court for the Fourth Department; that the defendant may make and serve a case and exceptions within sixty (60) days from the 23rd day of February, 1911; that the entry of judgment herein upon the verdict of the jury in favor of the plaintiff- and against the defendant be suspended until the hearing and decision of the Appellate Division upon said exceptions and that in the event of said defendant's exceptions being overruled by the Appellate Division the plaintiff- shall have the right to enter judgment upon the verdict in favor of the plaintiff- and against the defendant for the sum of $392.30 with interest from February 23, 1911, together with the costs of this action to be taxed.

Enter:

GEORGE A. BENTON,
Justice Supreme Court.

3 STATE OF NEW YORK:

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

Summons.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Ontario.

Dated this 10th day of August, 1909.

JOHN COLMEY,
Plaintiffs' Attorney.

Office and P. O. Address, Canandaigua, N. Y.

4 STATE OF NEW YORK:

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

Complaint.

The plaintiffs in the above-entitled action for their complaint against said defendant herein allege:

First. That during all the times hereinafter mentioned said plaintiffs were and now are co-partners, doing business at Victor, N. Y., under the firm name and style of L. G. Loomis & Son, and as such firm were and now are engaged in the business of buying, selling and handling wheat, rye, oats, apples, cabbage, potatoes, onions and other farm produce and of shipping the same in bulk over and upon the various lines of railroads owned and operated by said defendant herein, all of which said defendant was fully aware of and well knew during all the times hereinafter mentioned.

Second. Said plaintiffs further allege upon information
5 and belief that during all the times hereinafter mentioned
said defendant was and now is a foreign corporation organized and existing under the laws of the State of Pennsylvania and was and is a common carrier of grain, produce, goods, merchandise and freight for hire, owning and operating various lines and branches of railroads and as such common carrier was soliciting, receiving, accepting and transporting for hire grain, produce, freight and merchandise in bulk from Victor, Farmington, Stanley, Mendon, Henrietta, East Rush, Cedar Swamp, Rochester Junction, Clifton Springs, North Le Roy, and other places in the State of New York and to various places in the United States. That as such common carrier for hire it was the duty of said defendant to accept and receive in bulk and otherwise and to transport and deliver in a proper, careful and suitable manner wheat, oats, rye, apples, cabbage, potatoes, squash and other produce, merchandise and freight delivered or tendered to it by the plaintiffs and other persons for shipment and to furnish to these plaintiffs and other shippers proper and suitable cars and conveyances for shipment and transportation of such grain and produce over its lines and to suitably and properly equip its cars and conveyances so that the contents thereof and the grain and produce therein could be safely, quickly, conveniently and properly loaded, unloaded, examined and transported from the place where said freight was received to its destination.

That in shipping and transporting grain in bulk, in cars and
by rail it is and during all the times hereinafter mentioned
6 was necessary, proper and customary to protect said grain
from wasting, leaking and spilling and to enable it to be properly loaded, unloaded, inspected and handled, to have the cars in which said grain was shipped protected and equipped with inside

wooden doors called "bindoors," that in shipping and transporting apples, potatoes, cabbage and squash in bulk in cars and by rail it is and during all the times hereinafter mentioned was necessary, proper and customary to protect said apples, potatoes, cabbage and squash from freezing and heating and to enable the same to be properly and suitably loaded and unloaded to have the cars in which said produce was shipped equipped and furnished with wooden bulkheads, and in carrying and transporting of any loose or bulk commodity in freight cars, it is and was necessary to use a bindoor or bulkhead in cars in which said bulk freight was shipped and transported; all of which facts and customs were well known to the defendant and of which it had full knowledge during all the times hereinafter mentioned.

Third. That between the 29th day of August, 1906, and the 6th day of May, 1908, both dates inclusive, these plaintiffs were obliged to and necessarily did ship in bulk over the said lines or railroad owned and operated by said defendant various quantities of wheat, oats rye, apples, cabbage, squash and potatoes, and did pay to the defendant the proper freight and compensation therefor. That at each and all of the times said plaintiffs did
7 deliver said freight, grain, produce and merchandise to said defendant for shipment and at and prior to the time said defendant did receive and accept the same for shipment and transportation, said defendant well knew that said grain, produce, freight and merchandise was to be shipped and transported in bulk from the said receiving station to its point of destination. That attached hereto and made a part hereof is a statement marked "Schedule 'A,'" containing a brief description of the grain and produce so delivered by the plaintiffs to said defendant for transportation and which it received and accepted for transportation, together with a statement of the places from which the said cars and freight were shipped, the places to which said freight and cars were to be delivered, the contents of each said car, the number of feet of lumber necessarily used by plaintiff in making bindoors and bulkheads for said cars, the value of said lumber per thousand feet and the value of the lumber so used in said bulkheads or bindoors.

Said plaintiffs further allege that at each and all the times said defendant so delivered to these plaintiffs for loading in bulk said grain and produce it neglected and refused to perform its duty as such common carrier, and it failed and refused to properly and duly deliver a car in which said grain or produce could be safely, securely, properly and suitably loaded, unloaded and otherwise properly transported, and on each and all of such occasions it failed and refused to delivers cars properly and suitably equipped with
8 bindoors, bulkheads or other proper and necessary protection to keep said grain loaded therein from spilling, falling out and wasting during the loading, unloading and transportation thereof or to keep the squash, potatoes, cabbage and other produce from freezing, heating or otherwise being damaged during the loading, unloading or transportation thereof. That before loading such cars and placing said grain, potatoes and other produce therein,

said plaintiffs did demand of the said defendant that it properly and suitably protect said grain, potatoes, merchandise and other freight to be placed in its cars by bindoors, bulkheads or other proper and suitable protection, all of which said defendant knew to be necessary, but which it failed and refused to do. That said defendant so failing and refusing to so properly equip its said cars for the shipment of said grain and produce as set forth herein and in said statement hereto annexed, marked "Schedule 'A,'" and to furnish bindoors and bulkheads, these plaintiffs in order to protect their property during such transportation were obliged and compelled to and necessarily did purchase and furnish lumber and material necessary, proper and suitable to make such bindoors and bulkheads as were necessary and proper to protect the grain and produce during the loading, unloading, shipment, delivery and transportation thereof as aforesaid, and in so doing these plaintiffs did necessarily furnish and use the lumber and material set forth in said "Schedule 'A,'" hereto annexed, and as therein set forth. That said lumber and material was of the fair, actual and market value of Three
9 Hundred Twenty-two Dollars Seven Cents ($322.07), and
that it was necessary to use said lumber and all of the same in so protecting the property of said plaintiffs during the shipment of said property over the lines of railway owned and operated by said defendant and as hereinbefore stated.

That by reason of the facts hereinbefore stated and set forth and by reason of said defendant so failing and refusing to deliver to these plaintiffs on demand proper and suitably equipped cars for the transportation of said grain and produce in bulk, and by reason of said defendant's failing and refusing to furnish said bindoors for the cars in which said grain was shipped and bulkheads for the cars in which said other produce was shipped, said defendant became and now is indebted to these plaintiffs for the amount of value of the bulkheads and bindoors so necessarily furnished by these plaintiffs and did become indebted to these plaintiffs for moneys necessarily paid, laid out and expended by them for it and at said defendant's request in the amount of Three Hundred Twenty-two Dollars Seven Cents ($322.07), no part of which has been paid by said defendant to these plaintiffs and all of which is now due and payable.

That on or about the 5th day of February, 1907, these plaintiffs did make out a statement of the amount of the lumber so furnished by them for said bindoors and bulkheads, covering a period from the 29th day of August, 1906, to the 22d day of December, 1906, and amounting to the sum of One Hundred Seventy Dollars Twenty Cents ($170.20), and on or about the said 5th day of Feb-
10 ruary, 1907, they did duly present the same for payment
to said defendant, which said defendant refused to pay or any part thereof. That again and on or about the 12th day of September, 1907, these plaintiffs did make out and duly present to this defendant a statement of the amount of lumber used by them in making and furnishing said bindoors and bulkheads, covering a period from the 22d day of December, 1906, to June 14th, 1907,

and amounting to the sum of Forty-one Dollars Ninety-three Cents ($41.93), and did demand payment thereof, which said defendant failed and refused to pay; that on or about the 27th day of May, 1908, these plaintiffs did make out a statement of the amount and value of the lumber so used by them in making said bindoors and bulkheads covering a period from the 14th day of June, 1907, to the 6th day of May, 1908, amounting to the sum of One Hundred Nine Dollars Ninety-four Cents ($109.94), and did duly demand payment thereof of said defendant, which said defendant failed and refused to pay or any part thereof.

Wherefore, said plaintiffs demand judgment against said defendant for Three Hundred Twenty-two Dollars Seven Cents ($322.07), with interest on One Hundred Seventy Dollars Twenty Cents ($170.20) thereof from the 5th day of February, 1907, and interest on Forty-one Dollars Ninety-three Cents ($41.93) thereof from the 12th day of September, 1907, and interest on One Hundr
Nine Dollars Ninety-four Cents ($109.94) thereof from th
11 27th day of May, 1908, together with the costs and expenses of this action.

JOHN COLMEY,
Plaintiff's Attorney, Canandaigua, N. Y.

STATE OF NEW YORK,
County of Ontario, ss:

Leslie G. Loomis, Jr., being duly sworn, says he is one of the plaintiffs in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that said complaint is true to the knowledge of this deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters, he believes it to be true.

LESLIE G. LOOMIS, JR.

Sworn to before me this 10th day of August, 1909.

JOHN A. OSBORN,
Justice of the Peace.

(Here follow tables marked pages 11*a*, 11*b* and 11*c*.)

Date.	Car Number.	Shipped from	Shipped to	Via	Contents.
1906.					
Aug. 29,	65534 L. V.	Victor, N. Y.	Taunton, Mass		Wheat.
Sept. 5,	8409 "	Farmington, N. Y.	Brunswick, Me.		"
" 13,	8187 "	Mendon, N. Y.	" "		"
" "	61423 "	Farmington, N. Y.	" "		"
" 15,	61235 "	" "	Schenectady, N. Y.,	Sayre, Pa.	Oats.
" 24,	5982 "	" "	Louisville, Ky.		Apples.
" 27,	72602 "	Mendon, N. Y.	Baltimore, Md.		Rye.
" 28,	5745 "	" "	Perth Amboy, N. J.		Potatoes
" "	5372 "	" "	Bridgeport, Ct.		"
" "	6516 "	Farmington, N. Y.	Perth Amboy, N. J.		Apples.
" 29,	9977 M. D. T.	Mendon, N. Y.	Bridgeport, Ct.		Potatoes
Oct. 2,	7025 L. V.	Victor, N. Y.	New Bedford, Mass.		Apples.
" "	61148 "	Mendon, N. Y.	Honeoye Falls, N. Y.		Wheat.
" 4,	34934 "	Victor, N. Y.	Plainfield, N. J.		Potatoes
" "	5914 "	" "	Brockton, Mass.		Apples.
" "	6018 "	Farmington, N. Y.	New Bedford, Mass.		"
" 6,	34916 "	Victor, N. Y.	Jersey City, N. J.		Potatoes.
" 13,	16778 "	Mendon, N. Y.	Harrisburg, Pa.		"
" "	5574 "	Farmington, N. Y.	Dover, N. J.		"
" "	70001 "	" "	Honeoye Falls, N. Y.		Wheat.
" "	11279 M. D. T.	Victor, N. Y.	Springfield, Mass.		Apples.
" 15,	63439 L. V.	Farmington, N. Y.	Honeoye Falls, N. Y.		Wheat.
" "	811 B., R. & P.	" "	Steelton, Pa.		Apls. & Pots
" "	34899 L. V.	Mendon, N. Y.	Hartford, Ct.		" & Cabge.
" "	5769 "	" "	Lykens, Pa.		Potatoes.
" 16,	16917 M. C.	Victor, N. Y.	Perth Amboy, N. J.		Apples.
" "	464 P. R. R.	Mendon, N. Y.	Tower City, Pa.		Potatoes.
" 18,	5720 L. V.	" "	New Camden, Pa.		"
" "	38759 C. B. Q.	" "	Providence, R. I.		Apples
" 20,	34932 L. V.	Victor, N. Y.	Louisville, Ky.		"
" "	19499 P. & R.	" "	Bolton Sta., Balti.		Potatoes.
" "	5221 L. V.	Mendon, N. Y.	W. 27th St., N. Y., Pa. & N. J.		"
" 22,	4440 "	" "	" " " " " "		"
" "	66768 C. R. I. & P	Farmington, N. Y.	Washington, D. C.		"
" 24,	39298 C. B. & Q.	Victor, N. Y.	Harrisburg, Pa.		"
" 25,	19728 P. & R.	" "	Evansville, Ind.		Apples.
" "	66980 L. V.	" "	Marysville, Pa.		Potatoes.
" "	34856 "	Farmington, N. Y.	Evansville, Ind.		Apples.
" "	5417 "	" "	Hartford, Ct.		"
" "	59890 N. Y. C.	" "	Scranton, Pa.		Potatoes.
" 26,	5682 L. V.	Victor, N. Y.	Williamsburg, Pa.		"
" "	65599 "	Mendon, N. Y.	Scranton, Pa.		"
" 27,	15836 C. N. W.	Victor, N. Y.	Rochester, N. Y.		Apples.
" 29,	5557 L. V.	Farmington, N. Y.	Scranton, Pa.		Potatoes.
" "	5709 "	Mendon, N. Y.	" "		"
" "	80155 "	" "	Louisville, Ky.		Apples
" "	5707 "	Victor, N. Y.	Flower City, Pa.		Potatoes
" 30,	5551 "	" "	Cynthiana, Ky.		Apples.
Nov. 1,	5819 "	" "	Coopers H., Camden, N. J.		Potatoes.
" 2,	14811 M. D. T.	" "	Montgomery, W. Va.		"
" "	50548 L. V.	" "	West 27th St., N. Y., Pa. & N. J.		"
" "	55340 I. C.	Farmington, N. Y.	Decatur, Ill.		Apples.
" "	10759 A. R. T.	" "	Louisville, Ky.		"
" "	5581 L. V.	" "	Elizabeth, N. J.		Potatoes.
" 3,	29558 C. M. & St. P.	Victor, N. Y.	Poughkeepsie, N. Y.	Austin, Pa.	
" "	5368 L. V.	Mendon, N. Y.	Keasbys, N. J.		"
" "	62432 "	" "	Altoona, Pa.		"
" 5,	89753 "	Clifton Springs, N. Y.	Hanover, Pa.		Cabbage.
" 6,	11165 M. D. T.	Victor, N. Y.	Bound Bk., N. J.		Potatoes.
" 7,	5912 L. V.	Mendon, N. Y.	Meriden, Ct.		"
" 9,	5733 "	Farmington, N. Y.	Lykens, Pa.		"
" 9,	70266 "	Clifton Springs,	Winchester, N. H.		Cabbage.
" "	1105 "	" "	31st St. & Chest. Philadelphia, Pa.		"
" 10,	3388 S. F. R. D.	Victor, N. Y.	Boston, Mass.		"
" "	11215 M. D. T.	" "	Flemington, N. J.		Squash.
" 8,	74469 L. V.	Farmington, N. Y.	Red Lion, Pa.		Potatoes.
" 12,	5395 "	Mendon, N. Y.	Bridgeport, Ct.		Apples.
" "	8648 A. R. T.	Victor, N. Y.	Louisville, Ky.		"
" "	3558 U. R. T.	" "	" "		"
" "	10735 L. V	Farmington, N. Y.	Bellsville, Ill.		"
" 15,	5374 "	" "	Crown Point, N. Y.	Sayre, Pa	"

	Shipped from	Shipped to	Via	Contents.	No. Ft. Lumber Used.	Cost per M.Ft.	Value.
T.	Victor, N. Y.	Flemington, N. J.		Cabbage	75	" "	1.88
	Mendon, N. Y.	Poughkeepsie, N. Y.	Austin Pa.	Potatoes.	80	25.00	2.00
	Victor, N. Y.	Coopers Point, Camden, N. J.		"	90	" "	2.25
	Farmington, N. Y.	New Bedford, Mass.		"	64	" "	1.60
	Victor, N. Y.	Honeoye Falls, N. Y.		Apples.	90	" "	2.25
	" "	Martinsbury, W. Va.		Wheat.	75	" "	1.88
	Farmington, N. Y.	Rochester, N. Y.		Potatoes.	96	" "	2.40
D.	" "	Brockton, Mass.		Oats.	40	" "	1.00
	Mendon, N. Y.	Altoona, Pa.		Apples.	80	" "	2.00
	Mendon, N. Y.	Chambersburg, Pa.			80	" "	2.00
	" "	VanNest, N. Y.	Pa. & N. J.	Potatoes.	61	" "	1.52
	Farmington, N. Y.	N. Bridgewater, Mass.		Pot. & Cab.	60	" "	1.50
	Victor, N. Y.	PawPaw, W. Va.		" "	75	" "	1.88
E.	Farmington, N. Y.	Altoona, Pa.		Apples.	64	" "	1.60
	Victor, N. Y.	Coopers Point, Camden, N. J.		Potatoes	75	" "	1.88
	" "	Altoona, Pa.		"	90	" "	2.25
	Farmington, N. Y.	31st St. & Chest. Philadelphia, Pa.		"	40	" "	1.00
	Mendon, N. Y.	Honeoye Falls, N. Y.			60	" "	1.50
	Clifton Springs, N. Y.	Boston, Mass.		Cabbage.	40	18.75	.75
	Farmington, N. Y.	Honeoye Falls, N. Y.		Wheat.	96	26.00	2.40
	Clifton Springs, N. Y.	Boston, Mass.		Cabbage.	52	20.00	1.04
	Mendon, N. Y.	Washington, D. C.		Wheat.	80	25.00	2.00
T.	Victor, N. Y.	Evansville, Ind.		Cabbage.	100	" "	2.50
	Mendon, N. Y.	Rochester, N. Y.		"	68	" "	1.70
	" "	" "		"	48	" "	1.20
	Farmington, N. Y.	" "		Wheat.	112	" "	2.80
	Victor, N. Y.	Evansville, Ind.		"	64	" "	1.60
	Nth. LeRoy, N. Y.	Meriden, Ct.		"	68	" "	1.70
T.	Victor, N. Y.	Louisville, Ky.		Cabbage.	64	" "	1.60
	Nth. LeRoy, N. Y.	Washington, D. C.		"	72	" "	2.30
T.	Victor, N. Y.	Louisville, Ky.		"	60	" "	1.50
	Farmington, N. Y.	Honeoye Falls, N. Y.		"	90	" "	2.25
	" "	Rochester, N. Y.		"	90	" "	1.50
T.	Victor, N. Y.	Evansville, Ind.		Wheat.	100	" "	2.50
	Farmington, N. Y.	Providence, R. I.		Oats.	60	" "	1.50
	Victor, N. Y.	Jersey City, N. J.		Cabbage.	90	" "	2.25
	" "	Poughkeepsie, N. Y.	Interstate	Oats.	64	" "	1.60
	Farmington, N. Y.	Honeoye Falls, N. Y.		Cabbage.	91	" "	2.25
	Victor, N. Y.	Altoona. Pa.		" & Pots.	50	" "	1.25
	" "	E. 2nd St., Bayonne, N. J.		Wheat.	45	" "	1.13
	" "	Flatbush Ave., Brooklyn, N. Y.	Interstate.	Potatoes.	64	" "	1.60
	" "	Berwick, Pa.		"	36	" "	.90
	" "	Steelton, Pa.		"	64	" "	1.60
	" "	Albany, N. Y.	Interstate.	"	48	" "	1.20
	" "	Elizabeth, N. J.		"	48	" "	1.20
	" "	31st & Chest., Philadel., Pa.		"	64	" "	1.60
	" "	Poughkeepsie, N. Y.	Interstate.	"	64	" "	1.60
	" "	Coopers Point, Camden, N. J.		"	64	" "	1.60
	Victor, N. Y.	E. Rochester, N. Y.		Wheat.	80	$25.00	$2.00
	Stanley, N. Y.	Penn Yan, N. Y.		"	60	" "	1.20
	Victor, N. Y.	Philadelphia, Pa.		Cabbage.	40	" "	1.00
	Farmington, N. Y.	Honeoye Falls, N. Y.		Wheat.	90	" "	2.25
	Stanley, N. Y.	Penn Yan, N. Y.		"	60	20.00	1.20
	Victor, N. Y.	Pittsburg, Pa.		Cabbage.	32	25.00	.80
	Stanley, N. Y.	Penn Yan, N. Y.		Wheat.	60	20.00	1.20
	Henrietta, N. Y.	Louisville, Ky.		Cabbage.	24	25.00	.60
	Victor, N. Y.	Hoboken, N. J.		"	36	" "	.90
	Farmington, N. Y.	East Rush, N. Y.		Wheat.	90	" "	2.25
	" "	Rochester, N. Y.		"	100	" "	2.50
	Victor, N. Y.	E. St. Louis, Ill.		Cabbage.	90	" "	2.25
	East Rush, N. Y.	DuBois, Pa.		Potatoes.	36	" "	.90
W.	Henrietta, N. Y.	Louisville, Ky.		Cabbage.	24	" "	.60
t. L	East Rush, N. Y.	Steelton, Pa.		Potatoes.	36	" "	.90
	Farmington, N. Y.	Rochester, N. Y.		Oats.	90	" "	2.25
		Louisville, Ky.		Cabbage.	26	" "	.60
	Cedar Swamp, N. Y	Poughkeepsie, N. Y.	Interstate.	"	24	" "	.60
W.	Victor, N. Y.	E. St. Louis, Ill.		Apples.	60	" "	1.50
	East Rush, N. Y.	DuBois, Pa.		Potatoes.	36	" "	.90
	Rochester Junc.	" "		"	36	" "	.90
	Farmington, N. Y.	Ridgeway, Pa.		"	35	" "	.87
	Henrietta, N. Y.	Louisville, Ky.		Cabbage.	24	" "	.60

Date.	Car Number.	Shipped from	Shipped to	Via	Contents.
Oct. 26,	60437 L. V.	Farmington, N. Y.	Perth Amboy, N. J.		Potatoes.
" "	13064 M. S. C.	Henrietta, N. Y.	McKeeport, Pa.		Cabbage.
" "	15969 Con.	Rochester Junct.	DuBois, Pa.		Potatoes.
" 29,	82822 L. V.	Farmington, N. Y.	Monessen, Pa.		Potatoes.
" "	6539 "	" "	Elwood City, Pa.		"
" "	68302 "	" "	DuBois, Pa.		"
" "	26318 G. F.	East Rush, N. Y.	Oak Ridge, Pa.		"
" 30,	5562 L. V.	Farmington, N. Y.	Perth Amboy, N. J.		Cabbage.
" "	79295 C. & A.	East Rush, N. Y.	Pittsburg, Pa.		"
Nov. 1,	82117 L. V.	Victor, N. Y.	Youngwood, Pa.		Potatoes.
" 1,	82887 "	" "	Philadelphia, Pa.		Cabbage.
" 2,	1220 "	Rochester Junct.	Philadelphia, Pa.		"
" 5,	29439 C. & A.	Victor, N. Y.	Steelton, Pa.		"
" "	74149 L. V.	Victor, N. Y.	Altoona, Pa.		"
" "	309 U. R. T.	Farmington, N. Y.	Highland, Ill.		Apples.
" 8,	7677 L. V.	Victor, N. Y.	E. New York, N. Y.	Interstate.	Cabbage.
" 9,	14633 M. D. T.	" "	Hudson, Mass.		Potatoes.
" 11,	5566 L. V.	Farmington, N. Y.	Elizabeth, N. J.		"
" 12,	12913 M. D. T.	" "	Tyrone, Pa.		"
" "	11916 "	" "	Somerset, Pa.		"
" 13,	54321 I. C.	" "	Bayonne, N. J.		Cabbage.
" 27,	6056 L. V.	" "	Meriden, Ct.		"
" 29,	6086 "	" "	Wilmington, Del.		"
" 30,	5810 "	Victor, N. Y.	Portsmouth, O.		"
" "	4139 C. R. L.	" "	E. St. Louis, Ill.		Apples.
Dec. 11,	5779 L. V.	Farmington, N. Y.	Meriden, Ct.		Cabbage.
" 28,	84488 "	" "	Rochester, N. Y.		Oats.
" 30,	71603 "	Stanley, N. Y.	Oriskany Falls, N. Y.		Wheat.
" "	6540 "	Farmington, N. Y.	Boston, Mass.		Cabbage.
1908.					
Jan. 4,	67017 "	Farmington, N. Y.	Binghamton, N. Y.	Interstate.	Wheat.
" 9,	6042 "	Victor, N. Y.	Greensburg, Pa.		Cabbage.
" "	5866 "	Farmington, N. Y.	Jersey City, N. J.		"
" "	8783 "	" "	Rochester, N. Y.		Oats.
" "	6533 "	Victor, N. Y.	Evansville, Ind.		"
" 15,	5624 "	" "	Louisville, Ky.		"
" "	83874 "	Stanley, N. Y.	Rochester, N. Y.		"
" 16,	5696 "	Farmington, N. Y.	Jersey City, N. J.		"
" 20,	6528 "	Victor, N. Y.	Louisville, Ky.		"
" 21,	72266 "	Farmington, N. Y.	Lonsdale, R. I.		Oats.
" 23,	5597 "	Victor, N. Y.	Jeffersonville, Ind.		Cabbage.
" "	5256 "	Farmington, N. Y.	Philadelphia, Pa.		"
" 31,	5891 "	" "	Jersey City, N. J.		"
Feb. 17,	6061 "	Victor, N. Y.	DuBois, Pa.		"
" 28,	8902 "	Stanley, N. Y.	Franklin Spgs., N. Y.		Wheat.
Mch. 4,	72805 "	Farmington, N. Y.	East Rush, N. Y.		Cabbage.
" 9,	6512 "	Victor, N. Y.	Indiana, Pa.		"
" 12,	80198 "	Farmington, N. Y.	Rochester, N. Y.		Oats.
" 13,	69463 "	" "	" "		Wheat.
" 17,	73830 "	" "	" "		Oats.
" 25,	5343 "	Victor, N. Y.	Jersey City, N. J.		Cabbage.
" 28,	34924 "	" "	Troy, N. Y.	Interstate.	"
Apr. 4,	5961 "	Farmington, N. Y.	Dryland, Pa.		Potatoes.
" "	5804 "	" "	Troy, N. Y.	Interstate.	"
" 9,	5489 "	Victor, N. Y.	Jersey City, N. J.		Potatoes.
" 13,	5267 "	Mendon, N. Y.	E. New York, N. Y.	Interstate.	"
" 15,	5437 "	Farmington, N. Y.	Albany, N. Y.	Interstate.	"
" 16,	5841 "	Mendon, N. Y.	Camden, N. J.		"
" 18,	5244 "	Victor, N. Y.	" "		"
May 6,	72716 "	" "	Troy, N. Y.	Interstate.	"

12 STATE OF NEW YORK:

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

Answer.

The Defendant above named, by Kenefick, Cooke, Mitchell & Bass, its attorneys, answering the complaint of the plaintiff:

First.

I. Admits the allegations contained in paragraph or subdivision of the complaint numbered "First," and admits that at the times in the complaint mentioned defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and was and is a common carrier of grain, produce, goods, merchandise and freights, for hire, and operating various lines and branches of railroads, and as such common carrier was soliciting, receiving, accepting and transporting for hire, grain, produce, freight and merchandise in bulk from Victor, Farmington, Stanley, Mendon, Henrietta, East Rush, Cedar
13 Swamp, Rochester Junction, Clifton Springs, North Le Roy
and other places in the State of New York and to various places in the United States.

II. Admits that between the 29th day of August, 1906, and the 6th day of May, 1908, the defendant received from the plaintiff certain property consisting of grain and produce for transportation on or about the dates and at or about the places substantially as shown in Schedule A of the complaint herein.

III. Admits that it was the duty of the defendant to receive and transport said property at and from said places as alleged in the complaint.

IV. Admits and alleges that at the times in the complaint mentioned it was customary for shippers to equip cars so as to protect grain and produce from wasting, leaking, spilling, freezing and heating to enable said property to be loaded and unloaded, inspected and handled by shippers and consignees.

V. Denies that it has any knowledge or information sufficient to form a belief as to the allegations of the complaint with respect to the plaintiff having furnished the quantity of lumber alleged in Schedule A of the complaint herein to have been furnished and the value of the same.

VI. Denies, upon information and belief, each and every allegation in the complaint to the effect that it was the duty of the
14 defendant to furnish cars equipped with grain doors, bindoors
or bulkheads.

VII. Denies, on information and belief, each and every allegation said complaint contained not hereinbefore specifically admitted or denied.

Second.

And for a second, separate and further answer and defense to the plaintiff's complaint and the alleged cause of action therein contained, the defendant, by Kenefick, Cooke, Mitchell & Bass, its attorneys, alleges, upon information and belief, as follows:

VIII. That at all the times mentioned in said complaint the defendant was and still is a railroad corporation doing business between points within the State of New York and between points without the State of New York, to wit, between the States of New York, Pennsylvania, New Jersey and elsewhere, and as such corporation is subject to the Act of Congress approved February 11, 1887, known as the Interstate Commerce Act, and the several acts amendatory thereof and supplemental thereto, and is subject as well to the Act of Congress passed February 19, 1903, known as the Elkins Act, and the several acts amendatory thereof and supplemental thereto; that in accordance with the provisions of said Act of 1887, and the amendments thereto, the defendant, prior to November 11, 1906, filed with
the Interstate Commerce Commission, in the City of Wash-
15 ington, its tariff naming the rates on freight, including
freight of the character set forth in the complaint herein, between all points in the State of New York and many thousands of points outside of the said State, including all the points mentioned in Schedule A, annexed to the complaint; that the said tariffs named rates for transportation only, and did not provide for payments or allowances to be made for grain doors, bulkheads, or for the lumber used in making the same, placed in cars by shippers from the stations mentioned in the complaint.

IX. That the defendant is also subject to the act known as the Public Service Commissions Act of the State of New York, being Chap. 429 of the Laws of 1907, and the several acts amendatory thereof and supplemental thereto; that in accordance with the provisions of said acts in the amendments thereof, the defendant issued and filed with the Public Service Commission of the State of New York its tariffs naming the rates on freight including freight of the character set forth in the complaint herein between all points in the State of New York, including the points mentioned in Schedule A, annexed to the complaint; that the said tariffs named rates for transportation only and did not provide for payment or allowances to be made for grain doors, bulkheads, or for the lumber in using same, placed in the cars by shippers from the points mentioned in the complaint herein.

X. That the rates named in said tariffs were reasonable
16 and just charges to be made for the services to be performed,
and that such rates and charges have not been held to be unreasonable or unjust by the commission or body having jurisdiction thereof.

Third.

And for a third, separate and further answer and defense to the plaintiff's complaint and the alleged cause of action therein contained, the defendant, by Kenefick, Cooke, Mitchell & Bass, its attorneys, alleges, upon information and belief, as follows:

XI. That at all the times mentioned in said complaint the defendant was and still is a common carrier of passengers and freight for hire, and in pursuance of its duty as a common carrier of freight it furnishes, on demand, to shippers, cars suitable for the transportation of freight properly packed and secured; that it is the custom now, and has been for many years, for shippers of freight in carloads to load and unload their own freight, without the intervention of employes of the carrier and to secure their freight in cars in such manner as seems best to them, and if additional appliances of any kind seem necessary to them, such appliances are furnished and paid for by the shippers loading and unloading such cares. That the rate made on such freight by the defendant and published and filed with the proper commission, in pursuance of law, provided for transportation service only.

17 Wherefore, defendant demands judgment that the complaint of the plaintiffs herein be dismissed, with costs.

KENNEFICK, COOKE, MITCHELL & BASS,
Attorneys for Defendant.

Office and Post Office Address, 558 Ellicott Square, Buffalo, N. Y.

State of New York,
County of New York, ss:

E. A. Albright, being duly sworn, deposes and says, that he is an officer, to wit, the Assistant Secretary, of the Lehigh Valley Railroad Company, the defendant in the above entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

E. A. ALBRIGHT.

Sworn to before me this 2d day of February, 1910.

[SEAL.]
F. T. HARBACH,
Notary Public in and for New York Co., N. Y.

18 *Clerk's Minutes.*

At a Trial Term of Supreme Court, Held at the Court House, in the Village of Canandaigua, in and for the County of Ontario, State of New York, on Monday, the 20th day of February, 1911.

Supreme Court, County of Ontario.

LESLIE G. LOOMIS et al.
against
LEHIGH VALLEY RAILROAD COMPANY.

Clerk's Minutes.

Present: Hon. George A. Benton, Justice Supreme Court.

John Colmey, (E. P. White.)
Kenefick, Cooke, Mitchell & Bass, (Messrs. Strang and Beach.)

The above action having been reached on a call of the calendar, plaintiff's counsel moves the case and trial thereof is ordered, the following jurors being selected:

Jury.

Alfred Hanggi
Henry S. Mitchell
William J. Morrow
19 George D. Smith
Charles E. Whiting
Charles Lawyer
Fred Baumgartner
Milo Coulter
William L. Aldrich
Charles Vanderbilt
Charles Woodard
O. S. Titus

Adjourned to 9.30 A. M. to-morrow.

Tuesday, February 21st, 1911—9:30 a. m.

Court convened pursuant to adjournment.
Present: Hon. George A. Benton, Justice Supreme Court.
Witnesses called by plaintiff's counsel:

Leslie G. Loomis.
Fred G. Snook.
Joseph W. Tuttle.
John A. Flannigan.
Milton McMahon.
Frank O'Brien.
John Finnucan.
John Quinn.
Frank Jobes.
Leslie G. Loomis, Jr.
James Hosey.
Frank McFarland.
Frank A. Healy.
Edward G. Williamson.

Adjourned to 9:30 A. M. tomorrow.

Wednesday, February 22nd, 1911—9:30 a. m.

Court convened pursuant to adjournment.

Present: Hon. George A. Benton, Justice Supreme Court.

Witnesses called by plaintiff's counsel:

Charles Strong, Enos Childs, Francis G. Ferrin.

Plaintiff rests.

20 Defendant moves for nonsuit. Motion denied.

Witness called by defendant's counsel: T. Clem Beck.

Evidence closed.

Defendant renews motion for nonsuit. Motion denied.

Plaintiff moves for a direction of a verdict for the plaintiff.

Court grants the motion and orders the jury to find — the plaintiff for the sum of $322.07 and interest on the three claims from date at which each claim was filed.

Ordered, that all exceptions be heard at the Appellate Division in the first instance.

Stay of 60 days granted.

STATE OF NEW YORK,
Ontario County Clerk's Office,
Canandaigua, N. Y.:

I, J. M. Stoddard, Clerk of the County of Ontario, of the County Court of said County, and of the Supreme Court, both being Courts of Record, having a common seal, do hereby certify, that I have compared the annexed copy of Trial Minutes, Leslie G. Loomis, et al. vs. Lehigh Valley Railroad Co., with the original Trial Minutes entered in this office in Liber 8 Page 289 and that the same
21 is a correct transcript therefrom, and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts, this — day of ——, A. D. 190-.

[SEAL.] J. M. STODDARD, *Clerk.*

Supreme Court, Ontario County.

LESLIE G. LOOMIS et al.
against
LEHIGH VALLEY RAILROAD COMPANY.

Case & Exceptions.

This case was brought to trial at a Trial Term of the Supreme Court, held in and for Ontario County, on February 20, 1911, at three o'clock in the afternoon, at the Court House in the Village of Canandaigua, N. Y., before Mr. Justice Benton, and a jury, when the following proceedings were had and testimony taken.

Appearances:

Mr. John Colmey and Mr. Edward P. White, for Plaintiffs.
22 Kenefick, Cooke, Mitchell & Bass; Mr. Lyman M. Bass and Mr. Beach, for Defendant.

Jury impaneled.

February 21, 1911—9:30 o'clock a. m.

Mr. Colmey opened the case for the plaintiffs, and Mr. Bass for the defendant.

Leslie G. Loomis, being sworn, testified:

Direct examination by Mr. White:

I am one of the plaintiffs. I reside at Victor, N. Y., and have lived there about thirty-three years. My business is wholesale produce, commission and grain. I have been in that business for upwards of thirty years. I deal in grain of all kinds grown in this section and produce of all kinds grown in this section; wheat, barley, oats, rye; apples, potatoes, cabbage and vegetables of different sorts. I do a wholesale business. In the course of my business I buy from farmers in this region and ship to wholesale markets in this state and throughout the country. During all this time it has been a practice for me to ship by railroad; and it has been the practice for all the railroads to receive and transport this grain and produce in carload lots and bulk. I have done business principally on the New York Central, the Lehigh Valley since it extended to Buffalo, some on the Pennsylvania, the West Shore, and occasionally on the
23 B. R. & P., and D. & L. Railroad. I think the Lehigh Valley, the defendant road was put through Victor somewhere early in the nineties, in 1891 or 1892. The main line of the Lehigh Valley existed prior to that time as far as Geneva, and then an extension from Geneva westward and northerly was put through in the early nineties. I have used that road in the shipment of grain and produce since it was put through, at different stations, principally from Victor, Farmington and Mendon, some from East Rush, Rochester Junction, Stanley, and occasionally at Manchester. I have had agents at these several various points purchasing and shipping for me.

Q. What has been the course of business in regard to getting cars for the shipment of your produce, during these years?

Objected to, that the inquiry should be limited to 1907 and 1908. Received, subject to motion to strike out.

Q. When your agents wanted a car, how did they get it?

A. They ordered it from the railroad company.

And then the car would be furnished at that particular station pursuant to request. At these stations the defendant did not have any other facility for receiving bulk produce besides receiving it in the cars they furnished. When I had a load to ship of bulk produce at one of these stations, I had to have a car there to load it into. It was brought to the station on teams and wagons by the farm-
24 ers from whom it was purchased. If there wasn't a car there to receive it, they had to take it away or we had to furnish

storage; sometimes we had to put it in barrels or in some phosphate house or other place. That was the exception.

Q. Going back to the early years of your dealing in the wholesale produce business, did the railroad furnish any equipment for carrying grain—grain doors?

A. Yes, sir.

Mr. Bass: I object to the evidence as to what equipment, if any, was furnished at any time prior to the period covered in this case, as incompetent and improper.

Overruled. Exception.

A. It did.

Mr. Bass: I ask to have the answer stricken out, upon the grounds stated.

Denied. Exception.

All this class of evidence is taken under the objections stated.

A. When we began to ship over the New York Central and Lehigh, and in fact all roads, they furnished a car for grain, which was equipped with a grain door, which was fastened to the car and swung around into position and dropped down and fastened.
25 It was fastened by a rod coming out here and running from it (referring to model). This door would be on a hinge and it would slide on that rod, and it would slide here, and slide up here. When in use it was swung down here. It would be necessary to put a nail in so the grain would not slip between the ends of it and slide out.

The model was marked "Plaintiff's Exhibit 1."

Q. Exhibit 1 is what you looked at?

A. Yes, sir.

Q. Did you use such cars equipped with grain doors in your business?

A. We did for a time until the railroad ceased to furnish them.

Mr. Bass. I ask to have the evidence stricken out, upon the ground that any evidence in regard to the New York Central has no competency with reference to the defendant in this case.

Denied. Exception.

Q. When did this cease?

A. I should judge along about 1887 or 1888; I can't state definitely.

The motion was made upon the further ground that the custom was so far removed from 1907 and 1908 as to be incompetent.

Overruled. Exception.

A. Occasionally there is a road that we find a car with a grain door; the other day I found a western car with a grain door.

Objected to.

26 The Court: The question is, was this car suitably adapted to such merchandise as the company knew it was called upon

to carry; it is competent to show that other cars are equipped with the means the plaintiff claims are suitable and necessary. I hold the evidence is competent.

Q. Were those cars so furnished with the grain door equipments furnished by the Lehigh Valley from time to time?
A. Yes, sir.
Q. What other provision has been made by the Lehigh Valley and other companies for carrying bulk produce in cars?
A. After they ceased to furnish the car with the grain door, the Lehigh Valley furnished, in fact from the time it first came through the country from Geneva to Buffalo, it furnished lumber for a number of years for the shipper to have these grain doors or bulkheads as he preferred.
Q. Without charge?
A. Yes, sir.

Objected to. Overruled. Exception.

I know of their furnishing lumber for such purposes at Victor, Farmington, Mendon, Rochester Junction, East Rush, and Caledonia, I think, and a number of others I can't specify now—practically wherever we shipped from. Such lumber was furnished to me for grain doors and bulkheads and I so used it. That continued up to 1904, and possibly 1905. Then they refused to furnish it. At that time the agents at some of those stations made state-
27 ments to me as to their not furnishing such lumber.

Q. After they stopped furnishing lumber for these purposes, did the rate continue the same as it had been?

Q. After they stopped furnishing lumber for these purposes, did the rate continue the same as it had been?
A. It did.

Objected to as immaterial and incompetent.
Overruled. Exception.

After the road refused to furnish lumber for these purposes, I furnished it myself; I was obliged to. The present firm of Leslie G. Loomis & Son was organized in 1906 when Mr. Woodworth retired from the firm of Loomis & Woodworth. After the new firm was organized, I continued to keep an account of the lumber I furnished for these purposes. I had interviews with the local agents at Victor, Farmingham and Mendon of the roads where I was shipping, with respect to lumber. They were the local agents in charge of the shipping at those particular points. I notified those agents—Mr. Kendee at Farmington, Mr. Colligan at Victor, and Mr. Turner at Mendon. This was in 1906, and was before the items which we sue for in this complaint. I told each of those agents that unless the company furnished a car suitably equipped with grain doors we should so equip it ourselves and furnish a bill to the company for the value of the same, for reimbursement, or words to that effect. It was mentioned that bulkheads or grain doors were to be furnished. They told me they couldn't furnish it. Our agents were
28 thereupon instructed to keep track of the lumber furnished in these cars; and thereafter they rendered bills to me for the

lumber that they bought and put into those cars. We paid those bills. We have had a schedule prepared—schedule A annexed to the complaint—showing the amounts expended in that way. There are different kinds of cars that have been furnished us for the shipment of our grain and produce by the defendant—the different kinds mentioned in this complaint. We have had a common box car; we have also had a stock car for the shipment of cattle; for the shipments of produce we have had box cars or refrigerators, or a common box.

On one side of Exhibit 1, we have shown the side of a common box car. This sliding door is intended to represent the side door of a box car, the only door there is on a box car. In loading a box car with grain, we have these bin boards that we put inside of the door and fasten up against the standards of the door on the inside of the car. As we fill the car higher and higher, we put one bin board above another and fasten it in place to the height that we think required so the loading will not slop out of the car. If we didn't use bin boards we couldn't fill the car to the minimum capacity demanded by the classification, taking a carload shipment. The railroads have a classification and prescribe the number of pounds to the carload. With our potatoes it is 30,000 pounds as the minimum. The minimum on grain is 60,000; at the time of the com-
29 mencement of this action it was 40,000 pounds. We have to pay the rate on 40,000 pounds no matter whether we had only 20,000, if it was shipped in bulk. If we had to pay for 40,000 pounds we couldn't get that amount in without the bin boards. If we put part of the load into the car, putting what we get in either end of the car and closed the car door, in transit the grain would seek its level, in the movement of the train, as the car moved ahead or backed, and it would come against the outside door and press against the door until it would leak continually around the door, or it might press the door clear out. It is only a thin door, one thickness of lumber, usually. The loading would fall on the ground, and part of that load would be lost before it reached destination. When we got to destination with the car and started to open the door, the grain would run out on the ground. We might take a bar and push it open, but the pressure would be so great it would be hard to open. That portion of the grain lying against the door would run on the ground. In order to prevent that occurring, we put the bin boards as I have described. The opposite side of this model, marked "Side B", represents the side of a refrigerator car: it is a thicker wall; it is built with air spaces, also insulated to keep out heat or cold. On a grain car it is one thickness of lumber and reinforced as far as the loading is supposed to reach. This partition between the refrigerator car is supposed to be filled with a non-conductor. A produce
30 car has a ventilator in the top and ends. A refrigerator car has an ice box in each end in which ice can be put for refrigeration. In other respects the cars are practically the same. In the refrigerator car and the produce car the doors open out as shown in this model; they are hinged doors. On the other side it is a sliding door. This is a hinged door fastened to these rods on the outside. It is one continuous rod. These two doors are operated by a lever, so

that when we press the lever the two parts of the door open. If we attempted to load grain in a produce car or a refrigerator car, putting in either end of the car as much as we could and then closed the door, the same thing would happen in transit as I have described with reference to the box car. When we opened the refrigerator doors the grain would all run out; the grain would push against it so it would come out of the whole opening. On the other side it would only open to the amount you opened the car.

Taking up the subject of produce: If we tried to load an ordinary box car with produce without using bin boards or the bulkhead and put in either end what we could conveniently and close the door, practically the same would happen as in the case of the loading of grain. If we had potatoes or cabbages, they would come to the center of the car and seek a level. In that process of jolting back and forth the produce or potatoes would be jammed around and in-
jured and would come against the side of the car and when
31 the car was opened they would run out in the same manner.

When we ship produce in a box car in warm weather it is necessary to ventilate the car. We do that by closing this door partway; I might say there is a different hasp than is shown there; it had two holes in it, so if shoved up like this, it will leave an opening in the car. That is the way such a car is ventilated—by shoving the door back a ways and fastening the hasp on the second hole. Sometimes we might shove it back further and fasten it so it wouldn't open, but it wouldn't be a safe way. This is arranged so it can be sealed just the same. If we do not open the door for ventilation in hot weather, the produce will spoil. Take the first shipment of potatoes or apples, for instance, such a thing would happen. If we put a load of potatoes in a box car without bin boards, we couldn't open the door for ventilation because the loading would be right against the door. We sometimes use bulkheads instead of the bin boards across the door. The longer pieces of wood represent the bulkheads; the shorter ones, the bin boards. In order to put a bulkhead in the car, we take these boards of the width of the car and put them across the car adjoining the opening of the door; we construct it necessary to hold the loading in the end. Then we put on another and another as high as we wish to load the car. In a refrigerator car it is necessary to put a cleat up here. We usually use a two by four. If we do not, the bin boards across here would press across the
door so we couldn't close the door. We put the two by four
32 up here, and then put in the bin board or grain door so we can
close the door and fasten it. The same standards would be used to attach the bulkhead; they would be necessary to hold the bulkhead across and keep it from coming out. If we had a carload of potatoes loaded in a box car and had our bin boards in, and we opened the door for ventilation as I have described, it would be possible for pilfering to occur through that door, and it would be possible for persons outside of the car to steal potatoes through that opening. That does occur in practice. If, instead of the bin board across the door, we use our bulkhead across the car and put our potatoes inside of the bulkhead, we can then open the door for ventila-

tion without loss of the potatoes by stealing. A person on the outside cannot then reach through and get over the bulkhead.

In cold weather, we ship potatoes, apples and other produce, and are required at times to ship it in freezing weather. To protect produce in bulk in a box car from freezing in cold weather, we place a false bottom in the car by placing pieces across the car, then a one by six or eight, and placing underneath it four or five blocks which are sawed usually to make two by six inch stock sometimes six or eight inches long, this piece being nailed to them. They are first nailed to the floor and this piece fastened on top. If it is a 12-foot car—12-foot ends—we usually put four of these across. If it is a 14
car, we put five across. Then we take lumber of 12 or four-
33 teen foot length and lay in on top and nail it to those cross-
pieces, and then place paper over them. If we are going to use the shipment of that car all through the winter, we should put another floor over that. We bulkhead the shipment over that, so as to leave an open space. We can set a stove in here and drive the heat under the floor and heat the shipment and get it good and warm before it is shipped out, so it will be safe to carry to its destination. Then we take out the stove and close the door. We take pains to close the cracks of the doors; we batten them. In a refrigerator car we take paper and put around here, double thickness, and take a lath and nail the paper with the lath so it will be drawn up tight so no wind can drive through the cracks. Also, up here—wherever there could be an opening.

Q. Has this method of protecting produce from freezing been in common use all these years by shippers on common roads?

A. Yes, sir.

Q. In that method, you use bulkheads?

A. Yes, sir.

Q. Are bulkheads more convenient, more useful, in that respect, than bin boards would be?

A. Yes, sir. They are absolutely necessary. If we used bin boards, it would be fatal.

We would have no place for our stove and there would be no opening under the bottom for heat to pass around. In order to keep the
loading in the car and to load and unload it properly, we
34 must have either the bin boards or the bulkheads going across
the doors.

Q. In certain instances, either to provide for ventilation or to protect against freezing, the bulkhead is more useful than the bin door?

A. Yes, sir.

Q. And the bin door can not be used in such cases?

A. It cannot.

The expense of building the bulkhead is practically a little more than the grain door; it is a matter of a few cents. All three of these kinds of cars were furnished to us in these shipments on which we have sued. The railroad company did not make any difference in its rate whether it furnished us a refrigerator car, a produce car, or a box car; all were furnished at the same rate—that is, for the same shipment. I caused a claim to be made for the items alleged in our complaint and had my bookkeeper send them to the defendant. We presented the claim to the Lehigh Valley in 1907 for certain moneys paid out for lumber. I think the first claim, 93, Lehigh Valley No. E 41041, was presented February 5, 1907.

Q. How much was that claim?

Mr. White: I ask that the original claims be produced by the defendants.

Mr. Bass: I object, that there must be some proof that the witness has not the paper himself.

Q. You are producing a letter press copy book from your files which you call your claim book?

35 A. Yes, sir.

Q. Does this contain ink copies from your letter press of your claim 93 which you sent to the defendant?

A. Yes, sir.

Q. What is the amount of that?

A. $170.20. (Exhibit 2.)

Q. Was there a letter that accompanied that?

A. Yes, sir.

Exhibit 2 was put in evidence.

Q. You are producing a letter press copy of the letter dated February 5, 1907?

A. I do.

The letter was put in evidence. Exhibit 3.

Q. Did you, on April 6, 1907, write the defendant's division freight agent another letter with respect to this same claim 93?

A. I did.

Q. Is this a letter press copy of it?

A. It is.

The letter was put in evidence. Exhibit 4.

Q. Did you receive a reply thereto, dated April 8, 1907, from Mr. Hayden?

A. I did.

Letter put in evidence. Exhibit 5.

Q. On July 19th, did you write Mr. Hayden another letter with respect to this claim?

A. I did.

Q. Is this a letter press copy of it?

36 A. It is.

Letter put in evidence. Exhibit 6.

—I might state that I caused those letters to be written. I did not write them myself.

Q. On or about January 2, 1908, did you receive another letter from Mr. Hayden, with reference to this same claim?

A. I did.

Letter put in evidence. Exhibit 7.

Q. Did you present another claim?
A. Yes, sir; on the 12th day of September, 1907.
Q. For what amount?
A. $41.93.
Q. Have you a letter press copy of that claim?
A. I have.
Q. Is this it?
A. Yes, sir. Our number of that was 237; Lehigh Valley Company's number E, 42026.

The letter press copy was put in evidence. Exhibit 8.

Q. Did you present a third claim to the Lehigh Valley Company?
A. We did.
Q. When?
A. May 27, 1908.
Q. What was the amount of that claim?
A. It was $109.94.
Q. Do you produce the letter press copy of that?
37 A. I do. Our number of that claim was 428; Lehigh Valley's number E-43840.

The letter press copy was put in evidence. Exhibit 9.

Q. And the total is what?
A. $322.07.
Q. Did the Lehigh Valley pay any part of those claims?
A. They had not.
Q. Did they reject them?
A. They did.
Q. You had some correspondence with the defendant and its officers with respect to claim 428?
A. We did.
Q. Is this a copy of the correspondence?
A. It is.

Postal card, two letter press copies, and one original letter from the defendant put in evidence. Exhibit 10.

Cross-examination by Mr. Bass:

I have no Lehigh Valley letter to me of August 18, 1908, from Mr. Hayden, regarding E-43840. I haven't any such letter in the files. I couldn't say whether we received such a letter or not. I don't think we have this letter. It is possible that it was attached to the file and that some one returned the file and all and took this letter away with the file. I don't think we have such a letter. Mr. 38 A. T. Stark did not personally hand me our papers on Lehigh Valley files E-42026, at Victor, N. Y., between February 8th and 14th, 1908. I swear to that, to my recollection. I may be mistaken, but I don't think he did. He might have come to the office when I was not there. To my knowledge, that was not left at our office between those dates. With reference to claim 428, No. E-43840, I am prepared to swear positively that the claim was not returned to us in letter dated June 16, 1908, by Mr. Hayden. To my knowledge it was not returned to any member of our firm, and these papers were not at our office. I say that I don't know of their being left there.

Q. How many of these cars, and which cars, did you personally supervise the loading of?

A. Not any of them.

Q. So, when it comes down to the question of whether bulkheads or grain doors were put on any particular car, or the number of feet of lumber put on any particular car, you personally had no knowledge of that transaction or any transaction with reference to these particular shipments?

A. No, sir; I have no personal knowledge of that—the knowledge that comes to the office.

The classification I spoke of, referring to minimum and maximum loadings, is the classification that we are compelled to ship under. It is a printed document. I think the Lehigh Valley has its classification of different kinds of freight. I am not wholly familiar with the classification. I should think the paper itself would be better evidence than I could give. I know we are obliged to ship under
39 the classification. I saw the classification. I couldn't say
that we were shipping under tariff rates. I shipped under the rates demanded. There may have been instances when I personally caused the agent to place the proper rate, as I considered it at the time.

Q. You say you pay the proper freight rate on these shipments?

A. Yes, sir.

Q. And by that, you mean the tariff rates?

A. If that is what you term them. It was whatever rates were in effect at that time.

Q. You paid tariff rates on these shipments in effect at the time?

A. I will say I paid the rates that were in effect at that time.

Q. You cannot say that, as a shipper, you paid no attention to the tariff rates?

A. I think I did.

Q. If you intentionally made a shipment not provided for by tariff—if you made a shipment different from the tariff, knowing it was so, you know you would be committing a crime?

A. I know that is the law. I know it is sometimes done. I have tried to have the proper rate put on in every instance.

Q. The rates that you paid on these shipments, as set forth on your claims here, were the tariff rates?

A. I don't know as to that.

Q. You didn't inquire?

A. No, sir.

40 Q. You didn't care whether you did commit a crime?

A. I didn't intend to commit a crime. I don't know whether there was any tariff filed with your agent or at Washington.

Q. You didn't take the pains to find out?

A. No, sir; I knew what the general rate should be.

Q. Did not you assume, when you paid them, that they were the rates on file?

A. Naturally. I don't know whether the rates were on file, though.

In paying these freight charges, generally on delivery of shipments we would deduct from the amount of the draft made on the shipments, the amount of the freight charges. I think we have the books that would show the freights on these various shipments. I have the books here. I did not have anything to do with the keeping of our books. As to the accuracy of the books, there is a trial balance taken off the books each year, and I know it is correct. I think the custom I spoke of existing in 1887 and 1888 of furnishing doors continues even to the present time. I don't think it was customary on the part of the defendant's company in the year 1890. I think the custom of having material at some of the stations of the Lehigh Valley existed up to 1905. I couldn't say what time in 1905; I think I saw lumber piled at stations in 1905. I did not personally take any of it in 1905, and did not personally see any of our men take any of it in 1905. I can swear to that fact of my own 41 knowledge, from the simple fact that I know I saw the lumber there, and that we didn't furnish the doors of the cars. I may have seen it personally used; I couldn't say positively that I did. I don't think I have any record here that will show when that custom was stopped. I don't think I could look at my book and find out. The book shows what lumber was bought and paid for aned I might possibly find out in that way. I have books here. The grain door is the door that goes on the side, or parallel with the car; it is the inside guard of the outside door. The bulk-head consists of boards at right angles on either side of the opening to keep the load back. I testified before the Public Service Commission with reference to the question when the Lehigh Valley ceased furnishing grain doors on October, 1907.

Q. Did you not, at that time, testify in substance, "The Lehigh Valley, up to a few years ago, I can't say when, but up to two or three or four years ago the Lehigh Valley furnished doors at certain stations—nearly all the stations, and occasionally there might be a station where they didn't place the lumber for the doors"?

A. I think I did.

Q. That is the fact?

A. Yes, sir.

Q. Did you testify?

A. I think I did.

Q. Were you testifying to the truth?

A. I endeavor to.

42 On these particular shipments, the shipments covered by our claim, I don't personally know whether on any particular car a grain door was used or a bulkhead. Our employees have that information. The bulkhead is convenient for the shipper in certain instances.

Q. Is it not a fact that the consignees sometimes use the part between the bulkheads for the packing of potatoes?

A. I don't know as to that. I take it that they did, but I don't know as to that.

Q. You have testified to that already?

A. Perhaps so.

Q. Did you testify before the Public Service Commission in October, 1907, page 100, "Well, in a potato car, we load the potatoes at the ends of the car generally, sometimes all the way through the car, the same as we load grain, but generally bulkhead them in the ends of the car for the fact that when they reach destination they are more easily got at. The people can get into them and handle them, and they can handle them in rainy weather. They can sack them and draw them by team in canvas-covered wagons, which they couldn't do if they had to load them out on the ground and load them from there"?

A. I so testified, but I didn't say I knew it to be a fact.

—. Were you testifying to something that you didn't know to be a fact? You don't know anything about how these shipments are handled at the other end?

43 A. Not wholly.

I never heard but one claim that sometimes these cars are used by the consignees for the purpose of selling and unpacking potatoes for customers at that car. I have heard one claim that people used these places to sit in and sometimes to sleep in.

Q. A bulkhead costs ten or fifteen cents more than a grain door?

A. I should judge so—that it did at that time.

The length of the boards in a grain door depends upon the size of the car. The doors of the cars vary, and the width of the cars a little. The usual width of the ordinary door of the ordinary box car is from five to six feet. The width of the ordinary box car is eight feet—a little less in most instances; the entire construction, I think, is just eight feet. When we put on a grain door parallel with the car, we generally try to have the boards go beyond the ends of the door six or eight inches so it will get a good bite on the door. In ordinary practice they would be a foot or eighteen inches longer. If it was a five-foot door, we would have a six-foot or six and a half foot door. Our bulkheads don't vary much. Those boards are usually about eight feet long. We seldom load our cars with the maximum weight. The load depends upon our order; we load the car as our order calls for. We don't do any other shipping than car loads, as a general thing. I don't know but we have done 44 it. We might have to sack potatoes to go in less than carload lots. They wouldn't be permissible otherwise. I know that all through the middle west, and all through practically every state in the union, except possibly around here, that potatoes are not packed. I have done a good deal of business in the middle west. I have been through Michigan and have purchased potatoes from other sections, but not every year. I have not been through the central western states in eight or ten years; and what has gone on there I don't know personally, but I endeavor to keep myself informed as to that. In a produce car we put boards down that make an inner partition, on the bottom only. We don't load box cars with potatoes in the winter. A lining might be used on the sides and ends and bottom in a box car. When I testified with regard to

lining in cars, I meant refrigerator cars. We have put lining in some kinds of cars. I pay for that lining myself. We have put in a formal written claim to the defendant Lehigh Valley similar to these other claims of ours, for such expenditures. We did that prior to 1906 and in 1906 We never brought any law-suits for such claim. I had personal interviews with local agents at these places, Victor, Farmington and Mendon, as I recall. No doubt, I had with others. I think I had my first interview with Mr. Kendee at Farmington in August or September, 1906. I can't remember every particular interview. I know I made it a point to have that interview. I think Mr. Kendee was in the station at Farm-
45 ington when I saw him. I couldn't say whereabouts; I think, in the freight offices. I wouldn't be positive about that. I couldn't state whether he was standing up or sitting down.

Q. What, exactly, did you say to Mr. Kendee in that interview in August, 1906?

A. I told him that we should expect a properly equipped car, and that if it was not furnished we should put the lumber in ourselves and keep an account of it and file a claim against the company for the same.

Q. Is there anything else that you remember that you said in that conversation?

A. I don't think there is.

Q. That is the conversation in substance?

A. Yes, sir.

I couldn't tell the next time I saw Kendee or where; I saw him at different times. I do not remember any other particular conversation at any other place or time.

Q. Take Mr. Colligan at Victor; where was he?

A. In the station.

I think he was in the freight department at Victor. I think I saw him about that same time. I wouldn't say it was the same day, but it was practically at that same time. I had the same conversation with him that I had with Mr. Kendee. I don't remember anything else that I said or did. I can't remember the dates or wholly what was said at any other conversation with Colligan now. I wouldn't want to say that I can remember any part of a par-
46 ticular conversation at any particular time or place other than the one in September or August, 1906. I can remember a conversation that I had with Colligan with regard to the proceeding before the Public Service Commission. Grain doors was the subject of that conversation.

Q. Where did you see Turner?

A. At Mendon, about the same time?

Q. What did you say to him?

A. The same as I said to Colligan and Kendee.

Q. On your direct examination, you first said, when asked about this conversation, "I told them, unless the company furnished the proper car equipped with grain doors, we would ourselves furnish them," was that the conversation?

A. I told you it was words to that effect. I call any door that goes across that opening a grain door or bulkhead. That conversation said grain doors or bulkheads. If I didn't swear to that in my direct-examination, I intended to. I think I did.

Other than those conversations with agents which I have testified to, I think I had a conversation with Mr. Wiles, but I wouldn't swear positively to that. These conversations I have given you are substantially my best recollection. I don't know of any bulk shipment where a grain door or bulkhead is not used. Changing the word "bulk" for a carload, I have seen carloads of freight that did not have a bulkhead or grain door in them. I think there are carloads of pig iron where they have carload shipments where no bulkheads are used. I have not looked at the railroad classification
47 where the fact is shown that cars do carry freight
in box cars where they have carload shipments where no bulkheads are used; I don't study the classification except as it relates to my business. I endeavor to keep posted on the rates of our shipments from various points to the points where we send our shipments. Naturally I have kept in touch with the rates to New York, Philadelphia and elsewhere. I know what rates they charged me. I don't know whether there is any lower or higher rate existing. Before I expend money in the first instance toward buying these articles from some farmer, possibly I may send a telegram, trying to sell it. I do not raise the produce that I ship; I buy them.

Q. When you have to pay for lining, do you ultimately stand that expense, or do you make the man you send the goods to stand it?

A. I try to buy produce three cents a bushel less if I can, or sell it three cents more if I can. Unless the railroad company is enjoined to furnish it——

Q. Unless we furnish this extra equipment, you make the man from whom you purchase it stand it, or the man to whom you sell it?

A. I couldn't say; naturally, I don't stand it myself, if that is the way you term it.

Q. Have you an arrangement with each of these men to whom you sold the cars, or the man from whom you get the cars, to return the money you get in this lawsuit?

A. No, sir.

48 Q. Although some one else is to stand it—although you have already taken the money for these grain doors or bulkheads out of the man you buy from or to whom you sell, you are going to take the money if you can get it?

A. I am going to take it from the railroad company if I can get it.

Q. You have no arrangement to refund it to the farmer or to the consignee to whom you sold it?

A. No, sir. I will swear positively to that.

Q. So the question of whether extra expense is put upon the car for additional equipment ultimately falls either upon the person from whom the goods are bought or the person to whom the goods are sold?

Objected to, as immaterial, incompetent and irrelevant.
Sustained. Exception.

When these boards are being put in the cars for loading, they are put in by our men. A car is loaded within the prescribed time. Naturally many times our men have to wait for wagons to come up. Sometimes they are rushed. It depends on circumstances. In putting a stove in the car, we furnish the stove. And we furnish the paper that I speak of putting on; we always furnish it whether the railroad reimburses us for it or not. I have made claim against the Lehigh Valley for paper put on a car. I have copies of those claims. I have not made any claim for lath. We never
49 brought an action for lath or paper. The expense of putting potatoes in sacks and loading the sacks into cars would be about four cents a bushel—about three cents a bushel for the sack as actually used, and about a cent a bushel for extra labor. The minimum number of bushels of potatoes in a car would be 500 bushels. That would be a cost of about $20. Three cents a bushel is for the sack and one cent a bushel is for the labor. The sack would depreciate considerably; I wouldn't give much for it after it had been used. The sacks are emptied out and they can be used again unless there is a hole if you can find a customer for second-hand sack. Possibly they are worth 50 cents a sack; I couldn't say. The packing of a car with apples in barrels is worth from thirty-five to forty cents. I haven't figured out how many packages in a car.

Q. What proportion of that do you portion to material and what part labor.

A. That portion is on the barrel alone. The cost of packing depends. When a car gets to its destination I don't know whether they sack them or barrel them or ship them in bulk. I have shipped lots of apples in barrels, and some potatoes in sacks. Years ago I shipped in barrels when the trade demanded them in barrels, seed potatoes, for Louisville in particular.

Redirect examination by Mr. White:

The books I have in court pertain to the business of Leslie G. Loomis & Son. That firm started August 1, 1906. Trans-
50 actions prior to that date do not appear in the books of Loomis & Son.

MILTON MCMAHON, being sworn for the plaintiffs testified:

Direct examination by Mr. White:

I live at Fairport, N. Y. I am a wholesale dealer of produce at Fairport. I have been at Fairport about six months. Before that time I was engaged as bookkeeper for L. G. Loomis & Son. I was with Loomis & Son four years. During that time I had general charge of the office under Mr. Loomis, and the books and correspondence. Before I went to work for Mr. Loomis I was in the employ of the New York Central Railroad Company for something more than two years. I had no railroad experience previous to that. During the time that I was with the New York Central my duties

were various; I was freight clerk with different lines at different times, at Victor, N. Y., and Canandaigua, N. Y. During the years I have mentioned I knew of the practice of the railroad companies with regard to shipping produce. I have known of the shipping of grain and produce in bulk, in carload lots. Under the official classification they are obliged to receive for transportation produce in bulk in carload lots. That has been the fact as long as I was in the railroad business. After the firm of Loomis & Son was organized in August, 1906, I was employed by them as book-
51 keeper and I had general charge of their office work. At times I had assistants to work under me. I received and paid bills, and made out and presented claims; and at times had general charge of the correspondence. Beginning in August, 1906, I received bills from the loaders of cars of produce that had been shipped over the Lehigh Valley road. Those bills came from all the points where they were loaded. The bills were made for each shipment, and were placed on file in the plaintiff's office. They contained a statement of lumber furnished in those cars. It was part of my duty to see that such statement was annexed to each bill for every car loaded. When bills were rendered to us in which the lumber was not added, I sent it back to have it added or submitted it to the firm who had sent it back. Those bills from our loaders or buyers stated the amount paid for the produce or grain and stated also the amount expended for lumber; and the lumber was added to the cost of the car. We were paying the market price during those years for the grain and produce we bought, as much or more than other dealers in that line.

Q. Did you ever make any deduction from the amount paid to the farmers for the grain for the cost of bin boards or bulkheads?

A. No, sir.

Objected to, as not the best evidence, and as incompetent. Overruled. Exception.

Q. Did you attend to the payment of these bills?

52 A. Yes, sir.

Q. Were checks sent for the payment of these items—the bills including the lumber items—to the buyer or loader?

Objected to, as immaterial. Received.

A. Yes, sir.

In each instance, we paid for every item for lumber for which we received a bill from our agent or the buyer or loader at various points on the defendant's road. At Victor we furnished the lumber from Loomis & Son's plant, but at no other place besides Victor. We supplied lumber at Farmington from Loomis & Son's. From those bills that were rendered to us, I made up the claim that was presented to the Lehigh Valley road—the same claim referred to as No. 93. I made that up directly from the bills there on file. I also had charge of making up the other two claims presented to the Lehigh Valley. Those were made up directly from the bills on file as rendered to me. From the same bills and claim I made up

Schedule A, showing the entire amount of the claim, and the paper I have here marked "Schedule A" is a correct statement of all the items contained in the three claims presented to the Lehigh Valley. (Exhibit 11. This is the same schedule as annexed to the complaint as Schedule A.) This schedule shows, first, the date the bill passed through our office, the car number and initial, the point of shipment, destination, character of loading, the number 53 of pieces of lumber, and the cost and use, and the extension, the footing on the last page being the footing of the entire claim. By the extension I mean the value of the lumber carried as stated in each schedule. The items in this schedule are numbered consecutively from 1 to 201. The column of initials near the right side of the page are the initials of the different loaders, showing the loaders who loaded each car. Each loader has checked up from the original bills the amount therein stated in Schedule A. The party's initials opposite the particular items on the schedule are put there to designate the different cars he loaded, so that he could identify the item he had checked up from his bill. I attended to the collection of the bills rendered by the plaintiffs to their consignees.

Q. In any of these bills were the consignees charged with the price of the material for the bulkheads?

A. No, sir.

Objected to, as not the best evidence, and as immaterial. Overruled. Exception.

Cross-examination by Mr. Bass:

The footings in this are in my handwriting (Exhibit 11); the rest of it is in Miller's handwriting, I think. Exhibit 11, except the addition column, is not in my handwriting. The column in pencil at which appears initials is in the handwriting of the 54 different loaders. I could not say when the last column was put on there. They were not put on at the time the document was made. The column under the pencil word "Initial" was put on between the time the paper was made up and the present time. They were not on there when the paper was in my possession while I was bookkeeper. The initials in pencil under the column entitled "Shipped" just happen to be under that; it was a vacant column that was used for that. Under the column entitled "Loss" there are certain initials that appear in pencil. Those initials were not put on at the time this Exhibit 11 was originally prepared. Those have also been put on since I left the employ of Loomis & Son. So that the entries we have been talking about were not made in the course of the business by me or while I was in the employ of the plaintiff. Further than that, the entire statement itself, with the exception of the single question of addition at the bottom of these five pages, was made by somebody else than myself, under my supervision. At that time I personally compared each item in this other man's handwriting with the other papers, and checked each one. The paper I checked up with this was a tissue copy of the original claim; that is my rememberance of it. There were certain papers on file in the office, outside of this statement. Those were made by individuals other than myself. I did not personally have anything to do with the loading of the cars, or with measuring the amount of lumber in these cars after the lumber was in the car and I saw it.

55 Q. Did these records show which particular kind of equipment the lumber was used for, whether bulkheads or grain doors?

A. No, sir.

Q. Was there any record in your office which showed that fact?

A. No, sir.

The record of the first shipment on this Exhibit 11, from Victor, N. Y., to Taunton, Mass., in my office showed the delivering road only and the originating road. I kept no general books in my office showing the rate of freight. I kept books showing the rate of freight on particular shipments. The freight was almost invariably paid at destination. As to our potato shipments, in ninety-nine cases out of a hundred, the shipments of potatoes are actually sold delivered. They remain the property of the shipper until they arrive at destination and are inspected; and on the invoice sent to the purchaser we credit the amount of freight as shown on the bill of lading, but that freight is actually paid at destination by him. The amount of freight on these different shipments is shown by the bill of lading.

Q. Did you say Exhibit 11 was the same as Schedule A attached to the complaint?

A. Yes, sir.

Q. With reference to the truth or accuracy of the statements contained in these other papers that you have referred to, on the basis of which Exhibit 11 was made up, you have no personal 56 knowledge of the truth or accuracy of any of the items, amount or figures contained on those papers?

A. Not to the extent that I measured the lumber in each particular car.

Nor have I any personal knowledge to the extent that I was present at the time of the shipment or had anything personally to do with the shipment; and I have no personal knowledge of the truth or accuracy of these other papers. Mr. Loomis was really the directing factor of the concern. He did not decide whether produce was going to be bought at certain figures. When you buy produce in the open market you cannot decide on the price. At times I decided as to whether he was going to buy certain produce from certain farmers, and the amount. Mr. Loomis did not fully decide whether produce would be bought and how much would be paid for it. I wouldn't say that substantially all the transactions were under his directions. Many things enter into that. No one man can decide that definitely and put it down in dollars and cents. I would say that from my own practical experience. Perhaps it was more true of selling than buying that Mr. Loomis did not determine the price. It is not a fact that after Loomis & Son had bought produce, apples, wheat, or whatever it was, that the determination

of selling price was made by Loomis, senior, or under his direction and authority. The selling prices were not made exclusively nor wholly under the direction and authority of Mr. Loomis. Practically all was under his control in a general way. Some
57 of what was not under his control may have been under the control of the son and some under mine. I was in charge at all times in their absence. When they were there, they ran the business. In their absence it was necessary that some one else should conduct the business. The partners determined what they would ask for produce in nearly all cases. Then when it was understood what the goods were bought for, the great bulk of the business was determined by the partners when I was there. In their absence, if an inquiry came for a car of stuff, I used my judgment as to what price we would ask—that is what I meant when I spoke of fixing prices sometimes. I did not exercise my judgment in the same way as Mr. Loomis that I didn't make Loomis & Son stand the expense of equipment, in a single instance. I have no interest in this case.

Redirect examination by Mr. White:

I am in business for myself. Generally speaking, supply and demand enter into the fixing of the buying price of the produce in question in this suit. It was bought in the open market at what all produce dealers considered its fair market value. Our buyers did have a certain amount of discretion as to what they should pay in buying produce, and I had authority given to me by the plaintiffs to exercise in those matters. They relied upon my discretion from time to time. The same things that enter into the pur-
58 chase of it, supply and demand, entered into the fixing o
the selling price of the produce in suit. The man who wrote off this copy of Exhibit 11 for identification was working in the plaintiffs' office under my supervision; and this schedule was prepared under my supervision from time to time and has since been checked up by me, so that I know it is a correct schedule of the bills rendered to our office and on file as I have stated. I have seen those bills since I have been here; and these initials have been added to this paper since we have been waiting for this trial, in preparation for the trial.

Frank P. Jobes, being duly sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live at Honeoye Falls. I am a produce dealer, buying and selling at Honeoye Falls. I have been engaged in that business thirty years. I have, during that time, shipped produce on the Lehigh Valley Railroad. I began my shipping on the Lehigh when the line was put in at Honeoye; I don't know when that was. It was some time about 1902, I think, about eight or ten years ago. My place of business is located right on the Lehigh. I have shipped grain and produce in carload lots in bulk, during all that period.

Q. Have you used lumber to make grain doors and bulkheads in those shipments?

A. I have.

59 Q. Who has furnished the lumber for that purpose?

A. Up to five or six years ago the Lehigh furnished it.

Mr. Bass: This class of evidence is taken under my objection and exception.

So received.

The Lehigh Valley road furnished that lumber to me when I first began doing business with them. They brought sometimes, a carload or half a carload to the yard for the shippers to use, and it was used for making grain doors and bulkheads. No charge was ever made to me for it. They stopped that, I think, in the neighborhod of about six years ago—five or six years ago.

Cross-examination by Mr. Bass:

I don't think this furnishing of lumber stopped as early as 1903. I should say it was five or six years ago—may be not so long.

Fred T. Snook, being duly sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live at Ionia. I have lived there since last October. I formerly lived at Victor, N. Y. I was formerly in the employ of the Lehigh Valley Railroad Company. I couldn't give just the year when I first entered the employ of the Lehigh Valley
60 Railroad Company. It was somewhere about twenty years
ago. I was first located in their employ as extra operator on the old G. I. F., which is part of the defendant's railroad. From that time I was located at other points, working all along the line for the Lehigh Valley Company, before I went to Victor. I went to Victor in January, 1892, and remained there until September 1, 1904. When I went there in 1892, they were on construction of the road.

Q. During the period from 1892 to 1904, while you were at Victor, did the Lehigh Valley furnish lumber for grain doors and bulkheads for produce cars in shipping produce?

Objected to, upon the same grounds before stated, and as immaterial and incompetent.

Overruled. Exception.

A. They furnished lumber.

The course of business with regard to furnishing that lumber was that the lumber was shipped in there in half carloads and carloads and piled up in the yard for shippers to use when they saw fit; and they used it from time to time in putting in bin boards and bulkheads in cars of produce shipped in bulk. That continued all the time I was there. I think that was still the custom when I left there in 1904. Before I went to Victor, at other points on the

Lehigh Valley system, they furnished lumber for these purposes, and during my experience of twenty years and upwards that was the uniform custom of the Lehigh Valley.

61 Cross-examination by Mr. Bass:

I was stationed at Victor from 1892 to 1904. Before that time I had to do with lumber at West Fayette, Romulus, Hayt's Corners; I worked extra in nearly all those places. Those places cover the four places I have mentioned.

Frank O'Brien, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I have lived at Caledonia. My business is grain and produce. I am a member of the firm of John Ball & Co. I have been in the produce business since 1886, working, but having the direct interest for the last six years. Not all the time in Caledonia; since 1906 in Caledonia. We have shipped produce in bulk, in carload lots, in this part of the state, and I have known of the general practice in regard to it. I have known of lumber being furnished by the railroad for the purpose of putting grain doors and bulkheads in the cars for the purpose of shipping grain in bulk.

Q. Where have you known that to be done?

A. At Caledonia.

Q. Over what road?

A. The Erie.

Q. Before you went to Caledonia, did you know of that practice in other places?

A. I wouldn't care to testify about that—no definite knowledge.

62 Q. Does that practice continue there at the present time?

A. No, it has ceased.

Mr. Bass: I object to evidence as to the custom on other roads, and as incompetent on any issue in this case; also on the ground that what is done or not done since this action commenced, is not competent against the defendant, or after the period covered by this action.

The Court: I do not think evidence of custom for the period after these items is material.

Q. Has the Erie Company made any charge for that service?

A. No.

Cross-examination by Mr. Bass:

Q. As I understand, the only matter you are testifying about is at Caledonia?

A. Yes, sir.

Q. About the Erie Railroad?

A. Yes, sir.

Q. And a grain door for grain only?

A. Yes, sir.

Q. And in fact, there is no allowance made for bulkheads for shipments other than grain?

A. No, sir.

Q. There was no furnishing of lumber for any other shipments?

A. The lumber was furnished for grain shipments.

63 Q. You know nothing of the course of business of the Lehigh Valley in that respect?

A. No, sir.

Mr. Bass: I move that this testimony be stricken out, as immaterial, incompetent, irrelevant, and as having no relevancy in the case.

Denied. Exception.

LESLIE G. LOOMIS, JR., being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I am one of the plaintiffs. I live in Victor. In 1906 I had a talk with an agent of the defendant with regard to lumber for shipments of produce in bulk. I asked the agent at Victor to either furnish us a car with bin boards or bulkheads, or to furnish lumber that we might put them in. The agent was Colligan. He said he knew nothing about furnishing lumber by the railroad company—there wasn't any there. I had no definite conversation with any other agent of the Lehigh Valley on that subject. I have stated the substance of the conversation I had with Colligan. I led him to believe that we would look to the railroad company—I think I told him we would look to the railroad company—for the value of the lumber we put in the cars. After that time I caused an account to be kept of the value of the lumber that was put in the cars for bin boards and
64 bulkheads. I had charge of the loading at Victor. I saw
lumber put into cars furnished by the Lehigh Valley at Victor for grain doors and bulkheads. I kept an account of the number of the cars and the amount of lumber put into those cars. I have a statement of that account here only on the bills. I produce bills showing the amount of lumber put into cars at Victor. I made out some of those bills, and some were made out by Mr. Childs. He has charge of the work I have when I am away. At this time when I was learning the business he had supervision, teaching me. We worked together there, and I finally succeeded him in the work. I think the statement of August 29, 1906, is in Mr. McMahon's handwriting. I think I helped load that car, but I didn't make out the bill of it. I helped measure up the lumber on all those bills or directed that it should be put in them.

Q. I call your attention to the entry, "80 ft. of lumber at $25, two dollars;" what do you know about that?——

By Mr. Bass:

There is not any handwriting of mine on that first bill. Practically every one of the bills is made out in my handwriting; occa-

sionally when I was away it was not. Some of those I didn't make out I do not personally know about. Where there is no handwriting of mine on the bills, only in certain instances can I testify that I was or was not in Victor on that day. As matter of fact I
65 cannot remember this particular box car and measuring the lumber and the amount of the wheat in it when there is nothing on the paper in my handwriting, except as I might remember it.

Mr. White continues:

The numbers of the cars and the amount of lumber we put in each car as shown by the bills in my handwriting are: October 6, 1906, car 34916, L. V., 50 feet; October 13, 1906, car 11279, M. D. T., 100 feet; October 16, ... The number of the item is No. 17. I am giving those in my handwriting. The numbers of those bills not in my handwriting are 1, 12, 14, 15, 36, 43, 86, 87, 107, 117, 119, 201. All but the twelve I have numbered are in my handwriting. In these in my handwriting, I know that that amount of lumber went into those cars. The lumber was mostly hemlock. The fair value of that at that time was $25 a thousand. I have in my statement computed the number of feet at that price, and have correctly stated the amount in each instance.

The bundle of bills was marked Exhibit 12.

Cross-examination by Mr. Bass:

I have no way of ascertaining which of those cars contained bulkheads and which contained grain doors. I had a conversation in 1906 with Colligan. That interview was in August, I should say. It was just after I started in the firm. We started business in August, and I should say it was a few days after I started in the
66 business. I have given the conversation substantially as I had it. I have had other conversations with him with reference to furnishing bin boards, but I couldn't say what time. I can give the place. When it comes to a conversation concerning which I am willing to testify, it is the one I have given on my direct examination. Where the shipments were of grain, the lumber would be used for grain doors which would be parallel with the car. Where the shipment was oats, that would be the same. Where a shipment would be of apples, the equipment would not necessarily be a bulkhead; I have loaded them in both ways. A shipment of rye would have grain doors; a shipment of apples might be both ways; wheat would have grain doors. A shipment of apples and potatoes would probably be bulkheaded; it depends upon the size of the car, and that would be so with reference to apples and cabbage. Whether or not cabbage shipments would be bulkheaded, depends on the time of the year, etc. I only remember one car of rye, and I don't remember which that was. Potatoes were not usually bulkheaded—sometimes they were and sometimes binned. With the exception of wheat, oats and rye, which had grain doors, I have no way of knowing with reference to the other shipments whether they were grain doors or bulkheads that were put in the car. I have no record from

which I could determine that. These slips here in my handwriting represent the actual lumber used. I had something to do with the freight end of this business. Probably in only one case out
67 of a hundred was the freight paid at the shipping point. We kept track of the allowances made by the consignees. That would be deducted from our bill when the potatoes were sold and delivered; and so far as our draft connected with the bill, it would call for the amount and have the freight deducted.

Redirect examination by Mr. White:

Beginning in August, 1906, we had our employees and agents at the shipping points measure up the lumber used for the produce shipments and report it at our office. That system continued down into 1908. We never made a deduction from the price that we paid to the farmer for the produce or the grain with respect to any car as to which we personally furnished the lumber. We did not in any instance add to the selling price the cost of the lumber. I do not know of any instance in any car here in suit in which the cost of the bin boards or the bulkheads was taken out of the purchasing price or added to the selling price.

Recross-examination by Mr. Bass:

Q. You mean by that, that no specific item was put on the bill?

A. I mean what I said.

Q. You mean that your father did not get, as he testified, the price of the equipment, from the man he bought of or whom he sold?

68 A. We did not. It came out of the profit and loss.

Q. All the various reasons that entered into the statement of your selling price were not stated on your bills?

A. No.

Q. Your bill simply shows certain figures; it did not itemize that a grain door was included?

A. No, sir.

Q. Are you prepared to state that the fact is not as your father testified, that he got the value of the equipment either from the person from whom he bought or from the person to whom he sold?

A. He was not testifying with regard to the time these proceedings covered. In that question he was not answering relative to that time. At that time, if a car lining was not returned the railroad paid for it.

Stricken out.

Whether or not I fix the selling price depends upon who is in office. I had had some experience before I entered the business. I did have much to learn and I have yet. As to my knowing how my father fixed the prices, I knew what was charged above the selling price. I told the agent we would put in a bill for the lumber to the railroad company. It was not customary to charge the price of it in our selling price.

69 JOSEPH W. TUTTLE, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live at Farmington, and have lived there all my life. I am a farmer and produce buyer. I have been engaged in that business, I think, about sixteen years—practically ever since the railroad went through there. During the years from 1906 to 1908, I bought produce for the plaintiffs, and shipped it on the Lehigh Valley Railroad, in carload lots. From time to time I put lumber in those cars for grain doors and bulkheads. When I furnished lumber for a car in that way, I measured it up and ascertained the amount. I made an account of it, and such amounts were all charged up with the bills for produce. I made out a bill for each carload in which I stated the price of the grain or produce and I added on that a statement of the number of feet of lumber I had used in loading the car. The package of bills shown me (Exhibit 13) are the original bills that I made out and rendered to Loomis & Son. Take the first bill, No. 2, September 4, 1906, in box car 8409 I put 96 feet of lumber at $25 a thousand. That was a fair value of the lumber at that time. It was hemlock or pine. In each instance I put the number of feet of lumber used in each car in each of those bills in the car that is stated in the bill. I think they are all in my handwriting. I don't think there are any there that are not. I have checked them all over.

70 Cross-examination by Mr. Bass:

I could tell from the car what lumber was used for—bulkhead or grain door. I could tell which lumber was used for bulkheads and which for grain doors. Giving the number in blue pencil on the bill, the lumber in No. 2 was for grain doors; No. 4, grain doors; No. 5, grain doors; No. 6, grain doors; No. 10, grain doors; No. 16, bulkheads; No. 19, grain doors; No. 20, grain doors; No. 22, grain doors, No. 23, bulkheads; No. 29, bulkheads; No. 34, bulkheads, No. 38, bulkheads; No. 39, bulkheads; No. 40, grain doors; No. 44, grain doors; No. 52, bulkheads; No. 53, bulkheads; No. 54, grain doors; No. 61, grains doors; No. 66, bulkheads; No. 70, bulkheads; No. 71, grain doors; No. 75, bulkheads; No. 78, grain doors; No. 79, bulkheads; No. 83, grain doors; No. 85, grain doors; No. 88, bulkheads; No. 91, grain doors; No. 97, grain doors; No. 103, grain doors; No. 104, grain doors; No. 106, grain doors; No. 109, grain doors; No. 123, grain doors; No. 129, grain doors; No. 130, grain doors; No. 135, grain doors; No. 141, grain doors; No. 143, grain doors; No. 146, grain doors; No. 147, grain doors; No. 148, grain doors; No. 150, grain doors; No. 157, bulkheads; No. 160, bulkheads. I am able to look at that slip of paper and tell whether a grain door or bulkhead was used, because after November 1st we usually put in bulkheads and this was prior to that and I know they were grain doors. All shipments before November 15th, I put in grain doors and all shipments after November 15, with the exception
71 of grain and wheat and rye, I put in bulkheads. I know the amount of wheat I put in the cars. No. 61 would be bulk-

head; 162, bulkheads; 163, grain doors; 164, grain doors; 165, grain doors; 168, grain doors; 169, grain doors; 171, grain doors; 172, grain doors; 174, bulkhead; 175, grain doors; 179, bulkhead; 181, grain doors; 183, bulkhead; 184, bulkhead; 187, grain doors; 189, grain doors; 190, grain doors; 198, bulkheads.

Redirect examination by Mr. White:

Q. In prior years, in your early experience in the shipping of produce on the Lehigh Valley, what was the practice in regard to furnishing lumber for grain doors and bulkheads?

Objected to, upon the same grounds as before stated.
Overruled. Exception.

A. Lumber was furnished up to 1906 or before that, by the railroad company.
Q. By the Lehigh Valley?
A. Yes, sir.
Q. At Farmington?
A. Yes, sir.
Q. Did you know of it being furnished at other stations?
A. No, sir.

That practice had prevailed before 1906 quite a long time; I couldn't tell how long. When I began to ship on the Lehigh Valley, I think they were furnishing lumber for that purpose; I am not positive. I obtained it from the Lehigh Valley and used it in
72 equipping the cars of produce. The defendant never made any charge for that lumber. This lumber was usually piled up in the yard there, and they replenished the supply from time to time. All the shippers who were loading produce had access to that pile and used it in equipping produce cars. In 1906 I had a conversation at the station with the agent of the defendant at Farmington in regard to lumber for loading produce and grain. The agent was W. H. Kendee. I demanded lumber for fitting cars up with the grain doors and bin boards. I did that at the instruction of Mr. Loomis. I couldn't really tell what Kendee said, just now. He did not give me the lumber. He did not at any time after 1906 furnish any lumber. I demanded lumber several times after that and asked him if he was going to get it. That was all. When I have a car of grain or produce to ship, I apply to the agent for the car. As to the instructions I gave, I simply ordered a car for the produce whatever it was, telling the kind of produce that I was shipping. The cars usually came from Manchester. Once in a while one from Buffalo, but not often. We would order the cars and they would be brought in the next morning; and then I would notify farmers to bring in their loads to be loaded in the car. I didn't get the cars the next morning on every occasion.

Recross-examination by Mr. Bass:

I was working for Mr. Loomis. I haven't left his employ. I simply worked for him. He did not buy from me these
73 things specified in the bills. I simply used my billhead. That is merely the way I kept the transaction for him. In fact,

I was his agent. I didn't get any commission on this. I furnished the stuff for these cars and paid the money. I did not load cars for Mr. Loomis during this time for any other railroad besides the Lehigh. I didn't load the Central cars. I loaded simply in Farmington. Until about 1906 the Lehigh Valley had had lumber. I remember it was after 1905; I am positive of it. When the shipping season of 1906 began in August, they didn't give me lumber. I didn't have any conversation with anybody else except Kendee, and the conversation I had with him I had given. I have no memorandum or recollection of the particular day or the particular month I had that conversation. I would say it was earlier than 1907. I know it was about the time I charged him for lumber; I think it was in the fall of 1906. I had nothing to do with the paying of the freight. If I had occasion to, I paid for a car of freight.

Redirect examination by Mr. White:

In buying this produce I paid the market price. I never made any deduction from the price of any carload that I bought for any bin boards or bulkheads.

The bundle of bills referred to by the witness was marked Exhibit 13 for identification.

74 JOHN FINUCANE, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live at Mendon. My business is lumber, coal and produce. I have been in the produce business since 1904. I have been a shipper on the Lehigh Valley road for a good many years. I was buying grain and produce for L. G. Loomis & Son in 1906, 1907 and 1908, and I ordered cars from the defendant for such shipments. I gave my order to the agent. When I gave an order for a car, I asked the agent to furnish a car for produce. When the car came along I loaded. I think none of the cars furnished to me had any grain doors or bulkheads or bin boards. I supplied those cars with grain doors and bulkheads, and I kept an account of the amount of lumber I put in each car for that purpose; I put them on each bill. I measured up the lumber that I put in each car. I know the amount that I actually put in each car, as I look at these bills. They are all in my handwriting. At the time I made them out I made them out correctly; and I know that the amount stated in these bills was actually put in the cars mentioned.

Bills marked 13 for identification.

Cross-examination by Mr. Bass:

I don't think I could tell from looking at this bunch of memorandums which were bulkheads and which bin boards. I know
75 the wheat cars would be grain doors; the other cars I wouldn't be able to say. There would be grain. As to the others I couldn't say which it was. I was loading on joint account with Mr.

Loomis; those bills that seem to be between Mr. Loomis and myself as debtor and creditor were bills I used in my business. As to what I mean by joint account, I should put it that I was part owner of these shipments, although I don't know. When I finished loading a car I billed it to Loomis & Son and they paid me the actual cost of the wheat. When it was sold they divided the profit. They gave me half the profit. The lumber was put in as profit and loss. After the deduction of $520.50 was made from the sale, on shipment No. 3, Loomis and I would divide the balance. That is the way I understand it to be and I suppose that is the case. I trusted Loomis and Loomis trusted me.

Redirect examination by Mr. White:

It is true that the plaintiffs paid me the entire amount mentioned in the bills for all the lumber I put in the cars stated. These shipments were made in the name of L. G. Loomis & Son. They were the consignors of each car mentioned in the bill of lading; my name did not appear on the bill of lading at all. At a conversation with the agent of the Lehigh Valley at Mendon with regard to furnishing lumber for loading these cars in the fall of 1906, I asked him if he wasn't going to furnish bin boards and bulk boards for the car. I told him that was my instructions from Mr. Loomis. He said 76 they were not going to furnish any. He did not furnish any lumber after that. Mr. Loomis told me to keep an account of the lumber and I put it on each bill.

Q. Did you know of the Lehigh Valley furnishing the lumber prior to that time for equipping cars?

Objected to, upon the same ground.

Overruled. Exception.

A. Not in my time—not while I was shipping.

Q. Did you know of it being furnished at Mendon since you have been in business there?

A. Yes, sir.

There were other shippers of produce there. I wouldn't want to state any definite time that the Lehigh Valley furnished lumber for them. I was in the grocery business and I saw the lumber there and saw the shippers take it and use it in loading their cars.

Recross-examination by Mr. Bass:

I first started in the produce business at Mendon some time in the fall of 1904. I think it was later than the beginning of the season, but I am not positive. The Lehigh Valley did not furnish lumber in 1904 while I was in the business. I might have loaded a car or two for Loomis on the Central, but I am not certain. I did not at Mendon; the Central is not there. The name of the Lehigh Valley agent is H. Turner now, and I think it was Turner in 1904. 77 I had the conversation with Turner in 1906. I had the conversation with him, that I have mentioned in my direct examination, in the early fall of 1906. I couldn't say positively the day or the month. I might have spoken to him later, but I don't remember.

JAMES HOSEY, being duly sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live at Manchester. I am a wholesale produce dealer. I have shipped produce over the Lehigh Valley, and other roads. I have been shipping produce for about sixteen years. I have shipped over the Lehigh Valley all that time. I have shipped potatoes, apples, onions, cabbage, grain, hay and everything a farmer grows. I ship in carload lots, in bulk.

Q. In shipping this produce in the cars furnished by the Lehigh Valley, did they furnish any equipment of grain doors or bulkheads?

A. Part of the time they did.

Received under the same objections and exception.

I think they furnished us lumber up to 1906; after that time they didn't furnish it. There was a time when they didn't furnish any, I guess. I couldn't say how long a period that was. Sixteen years ago would take it back to 1895. From 1895, I think they 78 furnished bulk boards up to about 1906. I think there was no time when it was suspended. I think they furnished them during that time at that station.

Q. From 1895 to 1906 that was the continuous practice at Manchester?

A. I was at Farmington from 1895 to 1900, I guess. The Lehigh Valley furnished lumber at both Farmington and Manchester, and I knew of their furnishing lumber for such purpose at Clifton, Manchester and Farmington. I do not know anything about Rochester Junction. It is not a practicable matter to load cars with produce without grain doors or bulkheads. We tried to load potatoes in section without bulkheads. That doesn't go very good. They get the cars cracked and knock the potatoes out to the door, and they freeze.

JOHN G. FLANAGAN, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I reside at Sidney. That is a station on the Lehigh Valley Railroad. My business is coal, grain and produce. I have been in that business about ten years. I have shipped grain and produce on the Lehigh Valley Railroad and have shipped produce on that road for the plaintiffs, Loomis & Son. In the cars that I have shipped for the plaintiffs I have furnished lumber to load the cars. I kept an account of the lumber that I put in cars. I measured up the lumber in each car as I loaded it. I rendered a statement of the 79 lumber I used in each bill that I sent to the plaintiffs. Those are the bills that I rendered to the plaintiffs (Exhibit 15). I actually put into the cars mentioned in those bills the amount of lumber I have therein stated. I charged for the lumber at $20 a thousand. That was the fair value of the lumber at that time and place. The plaintiffs paid me the amount of the lumber stated in those bills.

Q. Prior to 1906, what was the practice of the Lehigh Valley with regard to furnishing lumber for loading produce in cars?

Objected to, upon the same grounds as before.
Overruled. Exception.

A. The Lehigh Valley Company furnished lumber for loading the cars.

That continued until 1906. I recollect that being done by them ever since I began business about 1900. Besides the Lehigh Valley I have shipped on the Pennsylvania. I have shipped produce and grain in bulk over that road?

Q. What has been the practice with regard to furnishing lumber on that road?

Mr. Bass: I object to any evidence of the custom on any other road.
Overruled. Exception.

A. They always furnished boards for grain and produce loaded in cars.

The Lehigh Valley and the Pennsylvania did not make me any
charge for the lumber that they used to furnish for this
80 purpose. Besides at Stanley, I know of lumber being fur-
nished at Gorham. That was prior to 1906.

Q. Did they furnish it at Gorham all the time they did at Stanley?

A. I don't think they did; I think there was a time when they did not furnish it at Gorham.

Q. Does the Pennsylvania road have a station at Gorham?

Mr. Bass: I object, upon the ground that Gorham is not one of the stations mentioned in the complaint.
Overruled.

A. No, sir.

Cross-examination by Mr. Bass:

This was a partnership transaction between Loomis and myself. I was not acting as agent; I had an interest in the shipment, and divided the profits with Loomis. I don't know, I guess it is right that there seem to be six cars here. Those are the only shipments I had in these statements. I can tell from an examination of this piece of paper that I made which were grain doors and which were bulkheads. They were all grain doors.

Redirect examination by Mr. White:

These transactions between the plaintiffs and myself have been closed, and I have no longer any interest in the matter. The shipments were made in the name of L. G. Loomis & Co. They were the consignors named in each bill of lading.

81 Recross-examination by Mr. Bass:

Here is certain grain and lumber amounting to $757.20; this shipment went on and was sold to some other party. Loomis and I were joint owners in the transaction.

Q. So that you and Loomis would deduct from the amount of your sale price and then divide the profit?

A. I presume so. Mr. Loomis got the money on the sales.

Q. Then this amount on these bills would be deducted and the balance divided between you after taking out expenses?

The Court: You bought the goods and paid for them, and sent the bills, and Loomis remitted to you, and when they accounted on the sales, they gave you half of the profits?

A. Yes, sir.

JOHN QUINN, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live in the Town of Mendon. I am a produce dealer. I have been in that business since 1892. In 1908 I bought two carloads of produce for Loomis & Son, and rendered them bills for those two carloads. I loaded those cars at Mendon, and I put lumber into the cars in loading them. I should say it was bin boards on account of the cost. I put lumber in these two cars as stated in these
82 two bills. These bills were paid to me by Loomis & Son.

The value of the lumber used in car 5267 was $25 a thousand —sixteen feet at two and a half cents a foot, forty cents. That was the amount I actually put in. In car L. V. 5841, there would be three pieces of hemlock at $25 a thousand, sixty cents.

Q. Did you know of the Lehigh Valley furnishing lumber for loading cars? State your early knowledge of the practice of the Lehigh Valley furnishing lumber for loading cars.

Objected to, upon the same grounds.
Received. Exception.

A. I loaded the first car in September in 1892. That was when the road came through there; that was when it was in operation. The company furnished the lumber for that car, and after that they continued to furnish lumber for other cars.

Cross-examination by Mr. Bass:

I think I bought and sold these cars on joint account with Loomis, I getting my share of the profits; I wouldn't swear positively. I bought some on joint account and some on commission. I think these two shipments were on joint account, but I am not positive.

Q. Those were bulkheads, were they, that you put in these cars?

A. I think it was joint account, but I won't be positive. I have loaded for them both ways. I loaded for Loomis & Son on
83 joint account. For Loomis I loaded both ways.

I am not positive when they stopped furnishing lumber at Mendon.

Q. In 1904?
A. Along in there somewhere.

Redirect examination by Mr. White:

After I rendered this bill to Loomis, he reimbursed me for the money stated in these bills, and subsequently after the sale took place the matter was adjusted between us. These transactions have been entirely closed between Loomis & Son and myself, and I have no longer any interest in them. Those shipments were made in the names of Loomis & Son; they were named in the bill of lading. I never made any deduction to my customers for the cost of the bin boards.

Bills marked 16 for identification.

Frank McFarland, being sworn for the plaintiff, testified.

Direct examination by Mr. White:

I live at LeRoy. I am a produce dealer. I have been in that business since 1904, I believe. In 1907 I bought and loaded two cars of produce for Loomis & Son, in Lehigh Valley car 5757, and Lehigh Valley car 5445. I should say I loaded cabbage in those cars. When those cars were furnished to me by the Lehigh Valley they did not have any grain doors or bulkheads or bin boards 84 in them. I put bulkheads in them. I measured up the lumber that I actually put into those cars, and kept an account of it and rendered a bill of it to Loomis & Son. Those are the bills that I rendered to them. (Exhibit 17.) They paid me the amount of those bills. The lumber that I put in those cars was six boards, 16 feet long and six inches wide, and two by four, 16 feet long. The date of that shipment was January 10, 1907. The other car was January 12, 1907, and there were in it eight boards six inches wide, 18 feet long, and two two by four, 16 feet long. I charged for that lumber $25 a thousand. That was the fair value at that time and place. That amount of the lumber was necessarily used in making the bulkheads for those shipments.

Cross-examination by Mr. Bass:

These two shipments were made at North LeRoy. The Collins Coal & Wood Company bill was a kind of billhead I got hold of. I am not positive that these were joint transactions where I shared profits; I have worked both ways. At no time did I act as Loomis' agent—I got a commission if I bought on commission. The other way, I would share in the profits. I don't remember which this was after these boards were put on I sent the bills to Loomis.

Redirect examination by Mr. White:

These transactions have been entirely closed between Loomis & Son and myself, and I have no personal interest in the matter.

85 **Frank A. Ely**, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live at Mendon, and my business is produce. I have been in that business about eighteen years. I am alone in business at the present time. Formerly I was in a firm and September 1, 1907, we dissolved. Since that I continued the business individually. That firm did a fairly extensive produce business. During the eighteen years I have been in the produce business I have shipped produce and grain also over the Lehigh Valley road and other roads. Side A of Exhibit 1, a car model, represents the side and the sliding door on the side of the box freight car in ordinary use on the Lehigh Valley and other railroads. And the opposite side B represents the side, with the hinged doors that open in two parts, of a refrigerator car or produce car. In the shipment of grain and produce during the years 1906 to 1908 and prior thereto, the kind of cars used were: for grain, box cars; produce, both box and refrigerator or produce cars. Those cars were not equipped with any grain doors or inside guards as they were ordinarily furnished by the railroads. It was necessary in loading either a box car or a refrigerator or produce car to have an inside guard or a bulkhead for the loading. That was necessary to retain the contents of the car. If we didn't have an inside guard, it would be impossible to load the car with even a minimum requirement without the use of bulkheads or grain doors. When you came to unload, the result of having no inside guard or bulkhead would be that when you opened the door the contents of the car would fall on the ground. The movement of the car in transit, as operated by the roads, would have a tendency, in the movement forward and back, to throw the contents of the car to the center of the car, and without the provision of the grain doors or bulkheads, when the door is opened the contents fall to the ground. The contents press upon the doors, if we have no inside boards, and tend to spread them out. It is necessary in shipping produce in box cars in warm weather to ventilate them in order to prevent decay. Most of the box cars have a hasp on this side that has two slots, one for closing the door tight, the other hole is nearer the end of the hasp and fits over the staple, leaving a space for ventilation. If we open a box car for ventilation in that manner it is absolutely necessary to have a bulkhead or grain door to keep the contents from losing out; and we couldn't ventilate the car unless we have one or the other of those appliances. If we open the door and use the bin boards nailed across the inside of the door parallel with it, it is then possible for a person on the outside to take some of the load out of that opening; when hooked in the last hasp there is a space for a man to get his arm in and pilfer the contents. That occurs sometimes. It can be prevented by leaving the bulkheads across the car. In cold weather it is necessary to protect the produce from freezing. That is done usually by lining the car. It is necessary to put a stove into the car and heat it in severe weather before we start it, and it is also necessary to put the stove in

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during the loading time. You cannot put it in during the loading time unless you have bulkheads—take the first load or two you put in, you might. In order to properly protect the car against freezing a stove is necessary and it must be placed between the bulkheads. I don't know that I think now of any other advantages with regard to grain doors or bulkheads that I have observed. I suppose it is more convenient to unload a car that is provided with bulkheads upon arrival at destination. I have observed that the side door of a box car will become loose and worn at the bottom and also at the sides after some use. It won't fit as tight as this new door does. The ordinary side door of a box car contains one thickness of lumber, except the battened door; simply like a barn door with one thickness of board with a batten to hold them together. The pressure against such a door will press it out so as to open a considerable space. Shipping in such a car without bin boards would result in loss shortage. You have to have either the grain doors or bulkheads in order to carry it safely.

Cross-examination by Mr. Bass:

I don't have to pack potatoes. I have never had to do it individually; prior to that I did that some. I have been in business for myself since September 1, 1907. I have been in the business
88 nearly eighteen years. As matter of fact bulkheads were convenient sometimes for a man to put in sacks to load in wagons on arrival at destination; also in rainy weather when we could back up to the doors of the car. Sometimes quite a bit of selling would be done on arrival at destination from the cars. I don't know whether sometimes men might use that space to sit down to keep out of the snow or occasionally to sleep; I never saw anybody sleep in there. I also know that box cars are used by railroads for carrying carload lots of many other articles than bulk produce and grain, in the carriage of which grain doors and bulkheads are not necessary; in such cases grain doors and bulkheads are not used.

Q. Also, a box car may come up to your station to be shipped out west or east or south, and it doesn't necessarily mean that when it goes there it will have a bulk shipment of potatoes or grain back?

A. I can't answer that.

Redirect examination by Mr. White:

Refrigerator and produce cars have more thickness in the walls than the ordinary box car; they are more elaborate and more expensive. When we ship potatoes either in the box car or produce car or refrigerator car, the company does not make any difference in the rate for the different kinds. They furnish any one of these different cars at the same rate. In some instances, when a car of produce with bulkheads in arrives at destination in severe
89 weather, it is necessary to put a stove in there to prevent freezing, immediately. That is a frequent practice. If we have the bulkheads there we can do that and prevent freezing at destination. If we do not have the bulkheads, we cannot do it.

Q. Do you remember the fact that the Lehigh Valley did discontinue the furnishing of the lumber for loading produce in cars?

Objected to, upon the same grounds.
Received. Excepted.

A. Yes, sir; I remember that they refused to furnish them.

Q. After they refused to furnish them, did the rate for shipment remain the same as before?

Objected to, as immaterial, incompetent and irrelevant. Received. Exception.

A. The rates were the same.

I do not know from any personal knowledge about the practice on other roads besides the Lehigh Valley with regard to furnishing lumber, previously.

Edward G. Williams, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live at Clifton Springs. My business is coal and produce. I am a member of the firm of Williams, Son & Co., and I think 90 I was in 1906. In 1906 I bought and loaded cars of produce for Loomis & Son, and shipped them on the Lehigh Valley road. When I wanted a car to load, I went to the agent. I told the agent so that he could furnish a car for that kind of produce. The five cars I loaded for Loomis & Son did not have any bulkheads or grain doors in them when I got them. I put either a grain door or bulkhead in all of those cars. I measured the amount of lumber I used in so doing and kept an account of it; and I rendered a bill of it to Loomis & Son. These are the bills that I rendered to the plaintiffs. Those bills were paid me by the plaintiffs.

Bills marked for identification, Exhibit 18.

I actually put in those cars the amount of lumber stated in the bills. I charged twenty dollars. That was the fair value of the lumber. I have no further interest in the matter.

Cross-examination by Mr. Bass:

I cannot state positively which of the cars had grain doors and which bulkheads, but I should say they were all grain doors to the best of my knowledge. These are made out on the firm billhead of Williams & Cowrie; I don't think he was with me at that time. I was on joint account with Loomis on these shipments. I would share in the profits on the shipments covered by the bills, if there was any. Part of these are in my own handwriting. The statement of the amount of lumber is in my handwriting; and that is a correct statement that I measured up and put in the car.

91 Redirect examination by Mr. White:

Mr. Loomis fixed the price at which I bought the produce; and that was the market price prevailing at that time. I measured this lumber and rendered bills for it at the request of Mr. Loomis.

February 22—9.30 o'clock a. m.

Mr. White: In connection with the testimony of the witnesses yesterday, I offer in evidence the bills, Exhibits 12, 13, 14, 16 and 17 and 18.

It is understood that the bills are offered and received in evidence simply upon the question of the amount of the expense incurred by the plaintiffs with regard to lumber, and showing the amount and value of the lumber put into the cars in question.

Charles Strong, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I reside in the Town of Rush. There is a station of the Lehigh Valley at that place. I am a produce dealer. I have been in that business about eighteen or nineteen years—ever since the Lehigh Valley came through Rush. I began shipping produce on the Lehigh Valley that year and I have continued it to the present time.

Q. Do you know the custom of the Lehigh Valley furnishing the lumber for bin boards and bulkheads?

A. I do.

92 Received, under the former objections and exceptions.

In the year 1907, I bought and loaded cars of produce for Loomis & Son. When I wanted a car from the Lehigh Valley for this purpose, I ordered the car from the agent. In ordering the car, I asked him if we could have lumber from the company to equip the car. He said they were not furnishing lumber at that time. Of course, that is a question I asked him a good many times.

Q. Did you say anything to the agent about what kind of produce you wanted to put into the car?

A. Yes, sir; that was the rule and we did that.

I don't know as we did every time, but most always. None of the cars furnished by the Lehigh Valley, when they came to us, were equipped with grain doors or bulkheads or bin boards, at that time. We put bin boards and bulkheads in those cars. We furnished the lumber for that purpose and kept an account of the lumber. I measured it up so as to know how much went into each car. I rendered an account of that lumber to Loomis & Son. Statement dated November 4, 1907, with a number of invoices annexed, was rendered, through my instructions, to Loomis & Son at the time they bear date.

Exhibit 19.

These bills were rendered to Loomis & Son on my printed bill-head. I had someone in my employ to do the typewriting.
93 I dictated the typewriting in these bills. I knew of my own knowledge that the lumber stated in these bills actually went into those cars, but I think there were a couple of cars loaded

over at Cedar Swamp that I didn't see loaded. Those cars had to have lumber in them in order to be loaded; they couldn't be loaded without it.

Q. Were those bills paid to you by the plaintiffs?

A. There were some at Cedar Swamp and some at Rochester Junction.

I shipped at all three of those points, and at all those points the Lehigh Valley had furnished lumber for this purpose, up to the year before, I think it was.

Cross-examination by Mr. Bass:

All those cars had grain doors—no bulkheads. I was shipping these on joint account. I divided the profits of the transaction with Loomis. I think the agent at Rush was James Wiles. I am quite positive. Harmon was the agent at Rochester Junction. Cedar Swamp was one of the points I shipped from. I don't know what the name of the agent there was. I don't think I ever had a talk with the agent there with regard to lumber. I had a talk with Harmon about the time I ordered cars. I haven't' any dates of it. When I ordered cars, I had a talk with him in regard to lumber. I asked him if they were furnishing lumber and he said
94 they were not. That was the substance of our talk. That was the same kind of talk I had with Wiles. That was about the same time; it was within a very short time.

Redirect examination by Mr. White:

Loomis & Son paid me the full amount of these bills. Loomis & Son paid me the full amount of this statement of lumber on the first page. I have no interest in this transaction at the present time.

Recross-examination by Mr. Bass:

Q. Do you remember whether you received any pay at all until you got your division of the profits arising out of these different transactions?

A. I don't know how to answer that. I loaded the car and sent Mr. Loomis a bill and he immediately sent me a check.

Later I would get my share of the profits. We were joint owners of the shipment from start to finish.

Redirect examination by Mr. White:

I notice the mark "Paid 11-6-'07" on this bill dated November 4, 1907. The only transaction I had with Mr. Loomis regarding this bill for lumber was that he sent me the full amount of the bill two days after it was rendered. All these cars were shipped in the name of Loomis & Son; they were consignors of the bill of lading.

95 W. W. Childs, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

I live in Rochester. I formerly lived in Victor, N. Y. I was formerly in the employ of Loomis & Son, of Victor, for the past twenty-seven years, almost continuously, and am still. In 1906 and 1907 and 1908 I was employed in no particular capacity; I do most anything pertaining to the business. I worked in the office; also at the freight station; and saw to the shipping and loading of the cars. During those years I saw to the loading for Loomis & Co. of certain carloads of produce over the Lehigh Valley road. In those cars that I supervised I saw that lumber was put into each car to hold the loading. I ascertained the number of feet of lumber put into each car and kept an account of the number of feet and the value of the lumber and the cost of it. Those accounts I turned in to the office of Loomis & Son.

Q. I show you plaintiff's Exhibit 12, the package of bills and ask you to turn to those which you find in your handwriting, and state whether or not you furnished the lumber stated in these bills you find in your handwriting?

A. No. 12.

I measured the lumber that went into that car. One hundred feet went into that car. The value of that was $25 a thousand—$2.50. That amount actually went into that car. The next one is fourteen.
Fifty feet of lumber went into that car. The value of it was
96 $1.25—$25 a thousand. The next one is fifteen; the amount
100 feet, amounting to $2.50—$25 a thousand. The next is
17; 50 feet; $25 a thousand—$1.25. 21, 100 feet; $25 a thousand, $2.50. 26, 100 feet; $25 a thousand, $2.50. 30, 100 feet; $25 a thousand, $2.50. 31 75 feet; $25 a thousand, $1.88. 35, 75 feet; $25 a thousand, $1.88. 36, 100 feet; $25 a thousand, $2.50. 37, 75 feet; $25 a thousand, $1.88. 41, 75 feet; $25 a thousand, $1.88. 43, 100 feet; $25 a thousand, $2.50. 47, 75 feet, $25 a thousand, $1.88. 48, 100 feet; $25 a thousand, $2.50. 49, 75 feet; $25 a thousand, $1.88. 50, 75 feet; $25 a thousand, $1.88.

Mr. Bass: I am not going to dispute the number of feet.

Q. Look at No. 86?

A. 75 feet; $25 a thousand, $1.88.

Q. No. 87?

A. 95 feet; $25 a thousand, $2.25.

Q. 107?

A. 90 feet; $25 a thousand, $2.25.

Q. 117?

A. 64 feet; $25 a thousand, $1.60. I guess I didn't carry out that amount. It is $1.60.

Q. 119?

A. 64 feet; $25 a thousand, $1.60.

Q. 201?

A. 60 feet; $1.50.

In these cars that I have specified I know that the amount of lumber stated actually went into those cars. I couldn't positively swear
about No. 1, but I am inclined to think there was 80 feet of
97 lumber went into that car; I think I measured that car. That
amounts to $2.00. Before I ordered these cars, I had a conversation with the agent at Victor; I would order a car from him and tell him it was to load cabbage or wheat, or whatever it might be.

That was my regular practice in ordering. I had a talk with the agent about furnishing lumber for these cars. It was during this time when we were loading these cars—during the time these cars I have testified about were loaded. I would ask him if he had any boards we could use for bin boards. I told him we couldn't keep stuff in cars without boards to hold it in. He said he hadn't got any. Several times I asked him. I would tell him we wanted boards and we were not going to furnish lumber to keep loading in the cars. He would laugh at me. That was all the satisfaction I got from him.

Cross-examination by Mr. Bass:

The agent I had the talk with was Mr. Collins. I don't think I can give any approximate idea of the date of my first talk. Probably it was during the year 1906, anyway, or 1907. It might be some time during 1906; it was during the loading of these cars. The place was Victor; I could not give the dates. It was in 1906 or 1907. I told him we wanted lumber for bin boards for the cars.

Francis G. Farrell, being sworn for the plaintiffs, testified.

Direct examination by Mr. White:

98 I reside in Rochester. My business is produce. I have been in that business twenty-seven or twenty-eight years. I am a member of the firm. Their line of business is produce and grain. They buy and sell at wholesale. We ship that produce on different railroads and from different stations; it goes on all the considerable railroads. We do not ship some in Rochester; all our stations are on the outside. For many years we have shipped produce on the Lehigh Valley at Honeoye Falls and East Rush. The other roads we have shipped on are, Pennsylvania; D. L. & W.; N. Y. & E.; New York Central; and B., R. & P. Our firm has done an extensive business through all this section of the country.

Q. Do you know of the custom of the Lehigh Valley for many years, furnishing lumber for bin boards and bulkheads?

Objected to, upon the same grounds before stated.
Overruled. Exception.

Q. Did you say you shipped over the B., R. & P.?
A. Yes, sir.
Q. Did the B., R. & P. furnish lumber during this period for bin boards and bulkheads?

Objected to, as immaterial, incompetent, and improper and upon the grounds before stated.
Overruled. *Objection.*

A. They did, for grain doors.
Q. Free of charge?

A. Yes, sir.

99 Q. And they have continued that down to the present time?

A. Yes, sir.

Objected to, upon the same grounds, and incompetent as relating to the time after the commencement of this action. Received.

I have known of the custom of using bin boards and grain doors in produce cars; the way the cars are furnished now we have to furnish the bin boards to hold the stuff in. It will burst out if we don't use them. If the door of the car is closed and there is no inside door, the grain will press against it and it will open up as wide as your finger and the grain will run out. I am a member of the New York State Shippers Protective Association. I have had considerable experience with railroad matters in that connection. I am president of the association.

Cross-examination by Mr. Bass:

Q. Do I understand that the B., R. & P. furnish no bulkheads for produce shipping?

A. Yes, sir.

Mr. White: In connection with the bills in evidence, I offer defendant's Exhibit 11, the schedule of those bills in a tabulated statement.

Received, subject to correction, as matter of convenience.

The plaintiffs here rested.

100 Mr. Bass: I move for a non-suit, on the grounds:

1. That this court has no jurisdiction of any of the matters involved in this action relative to any of the shipments that are involved.

2. That this court has no jurisdiction in this case of any of the interstate shipments that are involved.

3. That there is no cause of action on any of the shipments involved in this case, in that there is no evidence that any of the lumber was put on any of the cars at the request of the defendant.

4. That on none of the shipments can any implied request be inferred as against the defendant, in that the evidence conclusively shows that the defendant would not furnish any lumber, grain doors, bulkheads or bin boards, and that it refused to do so. In that connection, a contract, if one had been made to do this, would have been illegal in that it would have been giving a preference to this shipper which other shippers did not have, and that a contract cannot be implied when a contract if expressed would be against public policy and invalid.

5. That no cause of action lies in any of the cases or instances in the complaint, in that the freight was paid without protest; there is no evidence that any freight was paid under protest; and that any prior transactions, if any, are merged in the payment of the freight,

and, that not being paid under protest, under no circumstances can any recovery be had in any of the cases.

101 6. That in none of the cases involved was there any common law duty to furnish any equipment such as grain doors, bulkheads, bin boards, or boards, or whatever the lumber may have been used for, as testified to in this case.

7. That in cases where the shipments were on joint account, it appears that there was a partnership, in which one of the persons jointly interested with Loomis & Son was a half-owner in the transaction, and no assignment of any right of that joint owner is pleaded in this case, or can be proved in this case, and no damages can be recovered therefor.

8. That if there is any claim, which is denied on the part of any such half-owner, they, being the real parties in interest, must be joined as parties in the case or the claims cannot be considered.

9. That the plaintiff has an adequate remedy at law for damages for refusal of a carrier to furnish a proper car, if such improper car was furnished, and that the shipper, without the request of the railroad company, has no right to go ahead and do work on defendant's cars and make defendant liable therefor, without a request or an acquiescence permitting a request to be inferred, and the evidence is to the contrary, and no such request can be inferred or implied against the defendant.

10. That the plaintiff has an adequate remedy by mandamus, if proper cars are not furnished.

102 11. That this action is an improper action for the raising of any claim, if any, that the plaintiff might have by reason of the furnishing of any lumber as under the circumstances in this case.

12. That at various stations, to which I shall not now specifically call your Honor's attention, although one of them is Stanley, shipments were made on joint account, and no request whatsoever was made on the agent. As I remember, the only stations where there is any evidence that a request was made, or the question was asked whether the defendant would furnish grain doors or bulkheads, was at Farmington, Victor, East Rush and Honoeye Falls; that there is no evidence of request at Stanley, Henrietta, and various other places.

13. That, irrespective of any proposition that has ever been heard of in any case in court, these shipments where no request was made on defendant to furnish lumber, grain doors or bulkheads, were voluntary and on joint account, and there can be no recovery on transactions arising at those stations.

14. That the question here involved is both in respect to lumber placed on intrastate as well as interstate cars, is a question of rates, and this court has no jurisdiction to create any liability against the defendant by reason of any matters arising or connected with any of said intrastate or interstate transactions.

103 15. That this court has no jurisdiction to construe the meaning and terms of the provisions of the Interstate Commerce Act, where the question is involved of the meaning of Section

6 in particular of the Interstate Commerce Act, wherein, among other things, it is provided:

"Nor shall any carrier charge, or demand, or collect, or receive a greater or different compensation for such transportation for passengers or property, or for any service in connection therewith at the points named in such tariff, than the rate, fare and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit, in any manner or by any device, any portion of the rate, fare and charges so specified, nor extend to any shipper or person any privilege or facility in the transportation of passengers or property, except such as are specified in such tariff."

16. That the propriety of the defendant making any reparation in any amount for grain doors on interstate shipments, has been ruled upon and order issued pursuant to the Interstate Commerce Act by the Interstate Commerce Commission in its bulletin No. 4, paragraph 78, under date of June 1, 1908, and that this court has no jurisdiction to order any payment for any of the lumber furnished in this case by the plaintiff on any of the interstate shipments, as by virtue of the commerce clause of the Constitution of the United States, the Interstate Commerce Act and acts amendatory
104 thereof, the jurisdiction is solely and exclusively in the jurisdiction of the Interstate Commerce Commission in the first instance, and the courts of the United States thereafter, this court having no jurisdiction to consider any of the matters involved here, relating to lumber furnished on interstate cars.

17. That upon all the facts in the case, plaintiff has failed to make out a cause of action.

The Court: Said motion is denied, in each branch, and exception allowed as to each branch, with permission to complete any incomplete statements if you desire.

I assume it to be true that the rates paid were the regular rates, and that the railroad carrier did all that the acts of congress and of the state legislature required as to rates, and that freight was paid at such schedule rates. I assume that it is also true that service measures rates. To that extent, and to that only, are the rates involved in this case. It is equally true that, independent of any statute, there are common law obligations incurred by a carrier, and that an action for insufficient or inefficient service is not an action involving a question of rates, but a common law action whereby a shipper seeks to enforce a liability for non-compliance with the duty required. This is an action for damages for a breach of an implied contract to furnish sufficient and efficient cars for transportation. A commodity in bulk was offered and accepted, and it became
105 the duty of the carrier to furnish means reasonably sufficient to get it to its destination without unnecessary leakage, deterioration or waste. If he did not do that, it was a breach of contract, and as a measure of damages the shipper asks and is entitled to his actual expense in making the cars usable after request and refusal. Where a duty is imposed upon another, after default, a person damaged may perform and charge the expense to the other party, under the implied contract that he will repay.

I think the action holds on both these grounds. We have no jurisdiction over rates, and have nothing to do with them here.

Mr. Bass excepted.

T. CLEM BECK, being sworn for the defendant, testified.

Direct examination by Mr. Bass:

I am the chief of the tariff bureau of the defendant Lehigh Valley Railroad Company. I have been connected with the tariff bureau practically from its inception. I have been chief of the bureau from January, 1907. Before that, I was practically the same as the chief. I have been practically in charge of the tariff bureau since 1884. I am familiar with this lawsuit. I, and my men under my supervision, have checked over the various shipments that appear on the schedule annexed to the complaint. I am familiar with the tariffs that the Lehigh Valley has on its files and has filed, from the
106 29th of August, 1906, to the 6th day of May, 1908, with the Public Service Commission, second district of the State of New York, and also with the Interstate Commerce Commission. I have correct copies of those tariffs here with me that apply to the shipments involved in this case, with one exception. That is one shipment that went to Cynthiana, Kentucky. I forgot to bring that, partially, and partially because the information we had indicated that it went to Cincinnati. After going into checking the second time, I discovered that that one particular shipment went on another tariff. The company did have a tariff for that; it is simply a reissue of the old tariff. That tariff was on file with the Interstate Commerce Commission or Public Service Commission. With reference to the tariffs that were on file with the Interstate Commerce Commission and the Public Service Commission of the state and applicable to the exhibits set forth and annexed to the complaint, between August 29th, 1906, and the 6th day of May, 1908, there was no provision in any of those tariffs making an allowance to shippers for grain doors or bulkheads or lumber furnished in connection with grain and bulk produce shipments, originating at Victor, Farmington, Stanley, Mendon, Henrietta, East Rush, Cedar Swamp, Rochester Junction, Clifton Springs or North Le Roy. I have certain certificates here from the Interstate Commerce Commission and the Public Service Commission. The certificate of E. A. Moseley, Secretary of the Interstate Commerce Commission, dated the 11th
107 day of February, 1911, has reference to the tariffs showing the rates in cents per hundred pounds from a given point to points of destination as we secure, in connection with the items covered in the complaint. I have the copies of the tariffs referred to by the members in this certificate here with me.

Mr. Bass: I offer this certificate in evidence.

Received. Exhibit 20.

Mr. Bass: I offer in evidence a certificate made by John Kennedy, Secretary of the Public Service Commission, second district of New York, dated February 14th, 1911.

Received. Exhibit 21.

Witness continues:

I have here for examination correct copies of the tariffs referred to in Exhibits 20 and 21, which were filed with the Interstate Commerce Commission and the Public Service Commission, as stated in these certificates. They are in many instances the only copies I have. The law requires the railroad and myself, as chief of the tariff bureau, to keep and retain in my possession those copies. These tariffs, with the one exception I have spoken of, relate to the shipments from the stations to which my attention has been called, and as more particularly set forth on the detailed statement of the cars and shipping points and destinations set forth in the complaint. These tariffs, between August 29, 1906, and the 6th of May, 1908,
at points of origin as specified in the complaint and to which
108 my attention has been called, did not make any allowance to
shippers for grain doors or bulkheads or lumber furnished in connection with grain or bulk shipments of produce.

Mr. Bass: I offer in evidence the tariffs referred to in this certificate of which we have copies here.

Certificates 20 and 21 received.

Witness resumes:

The tariffs on their face do not show the dates of filing, but the dates effective. Before the effective dates, the tariffs were filed with the Interstate Commerce Commission and the Public Service Commission, as required by law. The tariffs are referred to in these certificates. I know they were filed with the Interstate Commerce Commission and the Public Service Commission. They were filed under my supervision. I am familiar with approximately the number of box cars that the defendant railroad had in the years 1906, 1907 and 1908. The Lehigh Valley owned from twenty to twenty-two thousand box cars, from eight to nine hundred produce cars, and about three hundred refrigerator cars. The Lehigh Valley carries a good many kinds of freight in box cars. This is the official classification. The official classification, as I understand it, is simply a list of articles classified according to the value of the commodity, according to the light and bulky nature of the commodity, and vice versa,
the heavy feature, the danger both from theft, fire or water,
109 and matters of that sort, so as to classify them, giving the
railroad companies remuneration for the transportation of freight. They are classified in several classes, notably 8. Class 1, class 2, rule 25, class 3, rule 26, class 4, class 5, and class 6. A majority of the freight on the official classification is shipped in carload lots, in box cars, without bulkheads or grain doors. It runs up into a number of articles. As to giving a general idea of the number of articles, unfortunately I have never given that any attention and I almost hesitate to say, but the book will stand for itself. There is no doubt about it, that there are hundreds of them. The cars are forwarded to foreign destination, as we term it, on other roads, and they are returned to best advantage either light or loaded, most of the time loaded. It is frequent that a car does not return by the same route that it was forwarded, and, as an illustration, a car may be forwarded from Mendon to Chicago, and the Chicago

line may have a loading for Washington, D. C., by an entirely different route, and finally it may land at Jersey City, or Bound Brook, or at Buffalo. As I understand the situation—I am not an operating man—the cars all have to be recoopered in the west and new doors placed therein, and if the return freight is of other kinds not requiring grain doors or bulkheads, they are not used.

Q. Take this complaint and take those shipments, and run them through and indicate the shipments where, on the face of the exhibits it appears that the shipment is from a point in New York to another point in New York, to where, in fact, in the course
110 of shipment, the shipment went outside the State of New York?

A. Shipment of September 15, 1906, car 61235, L. V., from Farmington, N. Y., to Schenectady, N. Y., oats, shown as item No. 5 of Exhibit 11, was forwarded to destination by the Lehigh Valley Railroad to Sayre, Penn., Owego, N. Y., and thence by D. H. Co. October 2, 1906, car L. V. 5221, Mendon, N. Y., to West 27th Street, New York, was forwarded by the Lehigh Valley Railroad direct, passing through the states of Pennsylvania and New Jersey. October 22, 1906, Car L. V. 4440, Mendon, N. Y., to West 27th Street, New York, same as above. November 2, 1906, L. V. 50548, Victor, N. Y., to West 27th Street, New York, same as above. November 3, 1906, car C. M. St. P., car 29558, Victor, N. Y., to Poughkeepsie, N. Y., was forwarded through the states of Pennsylvania and New Jersey in connection with the Lehigh Valley Railroad, via Austin, Penn., Lehigh Valley and Hudson River Railway and Central New England Railroad, to destination. November 15, 1906, car L. V. 5374, Farmington, N. Y., to Crown Point, N. Y., forwarded via Lehigh Valley Railroad to Sayre, Penn., Owego, N. Y., and D. & H. Company, to destination. November 17, 1906, car L. V. 5890, Mendon, N. Y., to Poughkeepsie, N. Y., same route as shown for C. M. & St. Paul Railroad, car 29558.

Q. It went out of the state?

A. It certainly did. November 23, 1906, car L. V. 5656, Mendon, N. Y., to Can. West, which should be Van Nest, N. Y., was forwarded via Lehigh Valley Railroad through State of Pennsylvania
111 and New Jersey to Jersey City, thence New York, New Haven & Hartford Railroad to destination.

Q. Take the number of the car and state?

A. March 6, 1907, M. G. V. car 14685, Victor, N. Y., to Poughkeepsie, N. Y., involved interstate movement. Car April 17, 1907, L. V. 6050, Victor to Flatbush and Brooklyn, N. Y., involved interstate movement. May 14, 1907, car L. V. 6021, Victor, N. Y., to Albany, N. Y., involved interstate movement. June 7, 1907, car L. V. 60899, Victor, N. Y., to Poughkeepsie, N. Y., involved interstate movement. October 19th, M. C. 16984, Cedar Swamp, N. Y., to Poughkeepsie, N. Y., involved interstate movement. October 26th, car Con. 15969, Rochester Junction to Du Bois, N. Y., should be Du Bois, Penn. November 8, 1907, car L. V. 7677, Victor, N. Y., to East New York, N. Y., involved interstate movement. January 4, 1908, car L. V. 67107, Farmington, N. Y., to Binghampton, N. Y.,

involved interstate movement. March 11, 1908, car L. V. 5894, Victor, N. Y., to Albany, N. Y., involved interstate movement. March 28th, car L. V. 34924, Victor, N. Y., to Troy, N. Y., involved interstate movement. April 4, 1908, car L. V. 5804, Farmington, N. Y., to Troy, N. Y., involved interstate movement. April 13, 1908, car L. V. 5267, Mendon, N. Y., to East New York, N. Y., involved interstate movement. April 15, 1908, car L. V. 5437, Farmington, N. Y., to Albany, N. Y., involved interstate movement. May 6, 1908, car L. V. 72716, Victor, N. Y., to Troy, N. Y., involved
interstate movement. There are two cars here that I am not
112 absolutely certain of, and that is December 30, 1907, 71603,
Stanley, N. Y., to Oriskany Falls, N. Y., and February 28, 1908, car L. V. 8902, Stanley, N. Y., to Franklin Springs, N. Y. This evidence I am offering is contingent to these car numbers being correct, which I know they are not, in several instances. These are shipments on the line of the Lehigh in the State of New York.

Cross-examination by Mr. White:

Our company issued circular No. 853, a paper purporting to be a printed copy of which is shown me, marked "I. C. C. No. B, 1850," on or about June 21, 1907. That became effective July 27, 1907. It has not since continued in effect. It continued until we issued another circular. The next circular we issued affecting that previous circular was I. C. C. No. B, 2603. It suppressed the previous circular and so states. It was issued Feb. 14, 1908, and took effect March 16, 1908. That continued in effect until we issued a third circular. The third circular was I. C. C. No. B, 2837. That was issued May 20, 1908, and was effective June 20, 1908.

Q. Has that since continued in effect?

Mr. Bass: I object to any question of the effectiveness or what occurred after the time involved in the shipments in this case—after May, 1908.

Sustained. Exception.

Mr. White: I will offer this in evidence.

113 Mr. Bass: I object, not to the form of proof, but simply
that this relates to grain doors or grain in bulk at Buffalo, East Buffalo, North Tonawanda, Niagara Falls and Suspension Bridge.

The Court: I receive those in effect in 1907, and decline to receive the last one. I receive only those covering the period involved in this suit.

Exhibits 22 and 23.

Our company issued a freight tariff or the rules governing furnishing of temporary doors or bulkheads for fruit or vegetables in bulk, in carloads, a paper purporting to be a printed copy of which is shown me. We issued that November 23, 1909, and it became effective November 25, 1909. We also issued another similar tariff November 24, 1909, effective November 26, 1909, known as I. C. C. No. B, 4907, and P. S. C. 2, N. Y., No. D, 1459.

The copies were offered in evidence.

Exhibits 25 and 26. Received.

Q. The copies of the tariffs you produce do not show the date of filing?

A. They do not.

Redirect examination by Mr. Bass:

They were filed before the date stated on the tariff.

Recross-examination by Mr. White:

It is my understanding that when these box cars got to Chicago and they had a loading of grain, they were all recoopered
114 there; I am not conversant absolutely with the modes in the west. I understand that cars that are shipped out from the west with grain are recoopered. By recoopering, I mean putting in a grain door. I am not prepared to say that the western roads make an allowance for that.

The evidence here closed.

Mr. Bass: I move for a direction of a verdict of no cause of action, on the grounds stated in my motion for a non-suit, and in addition that it now affirmatively appears that the question of the grain doors and bulkheads is a matter of rates, and with reference to interstate shipments, under the Constitution of the United States and the Interstate Commerce Act and acts amendatory thereof, this state court has no jurisdiction of interstate shipments, and equally under the laws of the State of New York since the Public Service Commission Act, has it no jurisdiction relative to intrastate shipments.

Mr. White: The plaintiffs move for a direction of a verdict for the plaintiffs, for the amount stated in the complaint, with interest as stated in the complaint, to wit: $170.20, with interest thereon from February 5, 1907, $41.93, with interest thereon from September 12, 1907 and $109.94 with interest thereon from May 27, 1908, those being the dates when these claims were presented to the company and rejected.

115 Mr. Bass: I will add another ground to my motion with reference to bulkheads, that there can be no recovery as they are for the convenience of the shipper or consignee.

The motion of Mr. Bass was denied, and exception taken as to each ground.

The Court: You may complete your motion and put it in such form as you desire, when you receive the stenographer's minutes.

The court directed a verdict for the plaintiffs for $322.07 with interest on the several claims of which the amount is composed from the dates of their several filings; to which Mr. Bass excepted.

Mr. Bass: I make a formal motion for a new trial, on all the grounds stated in Section 999 of the Code:

Denied. Exception.

Exceptions ordered to be heard in the Appellate Division in the first instance.

Order Settling Case.

The foregoing case and exceptions containing all the evidence given and proceedings had upon the trial of this action is hereby settled and signed by the undersigned, the justice before whom this action was tried, and ordered filed in the office of the Clerk of the County of Ontario as part of the record of said action.

Dated, August 23, 1911.

GEORGE A. BENTON,
Justice Supreme Court.

116 Supreme Court, Appellate Division, Fourth Department.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs-Respondents,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant-Appellant.

Affidavit of No Opinion.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

Lyman M. Bass, being duly sworn, deposes and says that he is a member of the firm of Kenefick, Cooke, Mitchell & Bass, the attorneys for the defendant in the above entitled action; that no poinion in writing was given by the justice before whom this case was tried, except the memorandum printed in this record on appeal herein.

LYMAN M. BASS.

Sworn to before me this 9th day of July, 1910.

CHARLES F. BLAIR,
Notary Public in and for Erie Co., N. Y.

117 *Stipulation re Exhibits.*

It is stipulated, that plaintiffs' Exhibits Nos. 2, 8 and 9, consisting of itemized claims presented by the plaintiffs to the defendant, include all the items set forth in Schedule A annexed to the plaintiffs' complaint, and that such claims were made at the dates appearing in the evidence, to-wit:

Claim No.	Amount.	Date.
93	$170.20	Feb. 5th, 1907
237	41.93	Sept. 12th, 1907
428	109.94	May 27th, 1908

It is also stipulated, that plaintiffs' Exhibits Nos. 12 to 19 inclusive, consisting of bills rendered for the several items of lumber used for grain doors or bulkheads in cars, shipped by the plaintiffs, are correctly summarized in plaintiffs' Exhibit 11, which is the same as Schedule A annexed to the said complaint.

The printing of said exhibits, Nos. 2, 8, 9, 11, and 12 to 19 inclusive and also 20 and 21, is therefore waived, but the originals may be produced in court upon the argument, if desired, and the defendant in printing said Schedule A may insert an additional column with the heading "via" indicating the route of any shipments which it claims were interstate shipments.

JOHN COLMEY,
Attorney for Plaintiff.
KENEFICK, COOKE, MITCHELL & BASS,
Attorneys for Defendant.

118 Supreme Court, Appellate Division, Fourth Department.

Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs-Respondents,
against
Lehigh Valley Railroad Company, Defendant-Appellant.

Stipulation Waiving Certification.

It is hereby stipulated, by and between the respective parties herein that the foregoing printed papers constitute the record on appeal to the Appellate Division of the Supreme Court, Fourth Department, herein, and are true copies of and from the originals thereof entered and remaining on file in the office of the Clerk of the County of Ontario, and the whole of said originals, and certification of the same is hereby waived, pursuant to the provisions of the statute in such cases made and provided.

Dated August 21, 1911.

JOHN COLMEY,
Attorney for Respondent.
KENEFICK, COOKE, MITCHELL & BASS,
Attorneys for Defendant.

119 *Plaintiffs' Exhibits.*

Exhibit 3.

Feb. 5, 1907.

Bert Hayden, D. F. A., Sayre, Pa.

Dear Sir: We enclose you herewith, our claim No. 93 for bulk boards used by us in cars loaded at different stations on the L. V. R. R. during the past Fall. Kindly give this your usual prompt attention and acknowledge receipt of same by giving us your claim number covering.

Yours truly,

L. G. LOOMIS & SON.

JMMc-M
Enc.

Exhibit 4.

April 6, 1907.

Bert Hayden, Esq., Div. Frt. Agt., L. V. R. R. Co., Sayre, Pa.

Dear Sir: On Feby. 5th, '07 we sent you our claim No. 93, amount $170.20. We have no acknowledgement of this. Will you kindly give us your number of claim and advise present status.

Very truly yours,

L. G. LOOMIS & SON.

120 Exhibit 5.

Subject: Grain doors furnished for various shipments:

Lehigh Valley Railroad.

Sayre, Pa., April 8, 1907.

L. G. Loomis & Son, Victor, N. Y.

Gentlemen: I beg to acknowledge receipt of your favor of the 5th inst., regarding your claim No. 93 for $170.20 account of grain doors furnished for various shipments from Victor, N. Y., Farmington, Mendon, and Clifton Springs, N. Y., to various points, and beg to advise that same has been placed for investigation under our claim register No. E-41041. I have today written our General Freight Department as to the present status of this claim, and will advise you promptly on receipt of reply.

Yours truly,

BERT HAYDEN, *D. F. A.*

Exhibit 6.

July 12, 1907.

B. Hayden, D. F. A., Sayre, Pa.

Dear Sir: Kindly advise why we have not received check in settlement of the following claims, Our No. 93 your No. 41041,
121 our No. 100 your No. 40653, our No. 138 your No. 40972,
our No. 159 your No. 41144. It seems to us that you have had these claims before your Co. long enough to adjust them properly and we again ask that you send us remittance to cover.

Yours truly,

L. G. LOOMIS & SON.

M. J. M.

EXHIBIT 7.

Subject: Outstanding claim of $170.20:—

Lehigh Valley Railroad.

Sayre, Pa., January 2, 1908.

Messrs. L. G. Loomis & Son, Victor, N. Y.

GENTLEMEN: Again referring to your letter of December 10th regarding outstanding claim of $170.20 against this Company account grain door boards furnished, covered by our E-41041 your No. 93, would advise that I am in receipt of a letter under date of December 31st, 1907, from Mr. H. C. Burnett, General Freight Agent, New York, his file S-47059, stating that this claim is being held pending a conference with the Legal Department, for the reason that grain door board allowance was not covered by
122 an I. C. C. issue at the time the shipment moved.

Yours truly,

BERT HAYDEN,
Division Freight Agent.
E.

EXHIBIT 10.

May 27, 1908.

B. Hayden, D. F. A., Sayre, Pa.

DEAR SIR: We enclose you herewith our claim No. 428. Kindly give this your prompt attention and acknowledge receipt of same by giving us your claim number covering. Also advise why we have not received check in payment of our several claims covered by your numbers as follows: E-41308, E-41310, E-41314, E-42581, E-42582, E-42584, E-42585, E-42643, E-42645, E-42669, E-42670, E-42878, E-42879, E-42890.

An early reply will greatly oblige

Yours truly,

M. J. M. L. G. LOOMIS & SON.

123

EXHIBIT 10.

Lehigh Valley Railroad.

SAYRE, PA., June 16, 1908.

Messrs. L. G. Loomis & Son, Victor, N. Y.

GENTLEMEN: With reference to your claim No. 428, our E-43840, $109.94 for boards furnished account shipments originating at various points on the Lehigh Valley Railroad, I beg to advise that we have submitted this claim to Mr. G. C. Arnold, G. C. A., who advises that inasmuch as we have no Tariff I. C. C., authority covering this expense, we cannot legally pay claims of this nature. Under the circumstances your claim is respectfully declined.

Yours truly,
BERT HAYDEN,
Division Freight Agent.

I. C. C. No. B-1850.

EXHIBIT 10.

June 20, 1908.

B. Hayden, D. F. A., Sayre, Pa.

DEAR SIR: Your favor of the 16th inst. at hand and noted. Replying will say in view of the fact that you do not see your
124 way clear to entertain our claim No. 428, your No. E-43840,
we ask that you return same to us. Upon receipt of same we will pass same to our attorney together with our other claims of a similar nature against your company. This will give you an opportunity of presenting to a jury your legal grounds supporting the position you have taken.

Yours truly,
L. G. LOOMIS & SON.

M. J. M.

EXHIBIT 22.

Lehigh Valley Railroad Company.

General Freight Department.

Circular No. 853.

Allowance for Grain Doors on Grain in Bulk.

NEW YORK, N. Y., June 21, 1907.

To Agents and Connections:

Effective June 22, 1907, when cars are loaded with Grain in bulk at Buffalo, East Buffalo, North Tonawanda, Niagara Falls and Suspension Bridge, N. Y., this Company will furnish cars with the necessary "Grain" doors (when the doors are missing therefrom) when required for the safe handling of the Grain.

125 The number of doors needed to prevent loss of property should be furnished in all cases, but not to exceed four, and they should be of substantial character, not less than three feet in height and made of lumber one inch or more in thickness.

Each way-bill must show actual number of doors furnished and by whom, railroad or shipper.

When furnished by this Company, a deduction from freight charges will be made to cover the expense at rate of fifty (50) cents per door, but not to exceed four (4) doors, or two dollars, ($2.00) per car, no allowance to be made for end doors, and will be borne by line to destination unless car is unloaded en route, in which event the expense will be borne up to the unloading point.

In way-billing deduct amount from freight earnings and show as advances, crediting same as miscellaneous earnings, making monthly report to Auditor of Traffic accordingly, except that where regular percentages do not yield minimum which may accrue to initial or terminal line, settlement will be made through claim account and no deduction will be made on way-bill.

When it is not convenient for this Company to supply necessary doors, same may be supplied by shippers, in which event an allowance as provided above will be made to shippers. Bills rendered by shippers for cost of doors, or material for same, must be certified as being correct by agents and forwarded to Freight Claim agent with statement of billing attached, for adjustment.

126 Expense will be prorated with interested lines north of the Ohio River or east of the Mississippi River or Virginia Gateways and east of the Western Terminal of Trunk Lines; also east of Chicago, Peoria or other junctions with Western Lines on Northwestern traffic or other traffic where through rate is not made up on Mississippi River combination.

Notice.

This Company will not join in expense incurred by Foreign Lines for doors furnished outside of above described territory.

H. C. BURNETT,
General Freight Agent.
J. S. WOOD,
Ass't General Freight Agent.
T. CLEM BECK,
Chief of Tariff Bureau.

Receipt No. 48946.

EXHIBIT 23.

(16948-2.)
File T. L-50.
P. S. C.-2 N. Y. No. D-775, Superseding P. S. C.-2 N. Y. No. D-545.
I. C. C. No. B-2603, Superseding I. C. C. No. B-1850

Circular No. 853.

127 Lehigh Valley Railroad Company.

General Freight Department.

H. C. Burnett, J. S. Wood, T. Clem Beck.

Allowance for Grain Doors on Grain in Bulk.

H. C. Burnett, J. S. Wood, T. Clem Beck.

Issued February 14, 1908; taking Effect March 16, 1908.

To Agents and Connections:

1. When cars are loaded with Grain in bulk at Buffalo, East Buffalo, North Tonawanda, Niagara Falls, Suspension Bridge, N. Y.,

this Company will furnish cars with the necessary "Grain" doors (when the doors are missing therefrom) when required for the safe handling of the Grain.

2. The number of doors needed to prevent loss of property should be furnished in all cases, but not to exceed four, and they should be of substantial character, not less than three feet in height and made of lumber one inch or more in thickness.

3. Each way-bill must show actual number of doors furnished and by whom, railroad or shipper.

4. When furnished by this Company, a deduction from freight charges will be made to cover the expense at rate of fifty (50) cents per door, but not to exceed four (4) doors, or two dollars ($2.00) per car, no allowance to be made for end doors, and will be
128 borne by line to destination unless car is unloaded en route, in which event the expense will be borne up to unloading point.

5. The Agent making the way-bill will deduct the amount of the grain door charge from the freight revenue and enter the same on the way-bill as Advanced Charges. He will clear his account of such Advanced Charges by charging the amount in his report, Form No. 254, stating such details thereon as the Auditor of Freight Traffic may require.

6. When it is not convenient for this Company to supply necessary doors, same may be supplied by shippers, in which event an allowance as provided above will be made to shippers. Bills rendered by shippers for cost of doors, or material for same, must be certified as being correct by agents and forwarded to Freight Claim Agent with statement of billing attached, for adjustment.

7. Expenses will be prorated with interested lines north of the Ohio River or east of the Mississippi River or Virginia Gateways and east of the Western Termini of Trunk Lines; also east of Chicago, Peoria or other junctions with Western Lines on Northwestern traffic or other traffic where through rate is not made up on Mississippi River combination.

Notice.

This Company will not join in expense incurred by foreign lines for doors furnished outside of above described territory.
129

H. C. BURNETT,
General Freight Agent, New York, N. Y.
J. S. WOOD,
Ass't General Freight Agent, New York N. Y.

Issued by

T. CLEM BECK,
Chief of Tariff Bureau, New York, N. Y.

Receipt No. 51369.

EXHIBIT 25.

(17037-1.)
File T. L. 50.
P. S. C.-2 N. Y. No. D-1458.
Tariff No. 7421.

No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff.

Lehigh Valley Railroad Company.

Freight Tariff of Rules Governing Furnishing of Temporary Doors or Bulkheads for Fruits or Vegetables, in Bulk, in Carloads.

130 The following rules will govern the furnishing of temporary doors, or bulkheads, in lieu of temporary doors, for shipments of fruits or vegetables in bulk, in carloads, on shipments moving wholly within the State of New York:

1. When cars are furnished for shipments of fruits or vegetables in bulk, in carloads, temporary doors or boards, not less than three feet in height, made of lumber one inch or more in thickness, will be provided by this Company, when doors or lumber are available at shipping point.

2. When temporary doors or boards, not less than one inch in thickness, are furnished by shippers for the shipments of fruits or vegetables in bulk, in carloads, allowance to shippers will be made at the rate of 16 2/3 cents per foot of height of door, or 50 cents per door three feet in height, provided that the maximum allowance per car for temporary doors or boards will not exceed $2.00. If the boards or doors are attached with spaces between the boards the width of the boards will be taken as the measurement for ascertaining the proper allowance to be made to shippers at the rate of 16 2/3 cents per foot of height of doors.

3. If shippers of fruits in bulk, in carloads, elect to furnish bulkheads or bulkhead boards, of not less than one inch in thickness, in lieu of temporary doors, allowance to shippers for bulkheads or bulkhead boards will be made at the rate of 16 2/3 cents per foot of height of bulkhead, provided that the maximum allowance 131 per car will not exceed $2.00 for bulkheads or bulkhead boards. If the bulkhead or bulkhead boards are made or attached with spaces between the boards the width of the boards will be taken as the measurement for ascertaining the proper allowance to shippers at the rate of 16 2/3 cents per foot of height of bulkhead.

4. If shippers of fruit or vegetables in bulk, in carloads, furnish both temporary doors and bulkheads allowance will be made only for temporary doors as provided in Rule 2.

5. When temporary doors or bulkheads, as the case may be, are furnished by shippers of fruits or vegetables in bulk, in carloads, bills for the above allowances should be rendered monthly to the Freight Agent at point of origin, and the correctness of such bills

must be certified to by agents, and forwarded to the General Claim Agent, with statement of billing, for adjustment.

Issued November 23, 1909. Effective November 25, 1909.

Issued on one day's notice to the public and Commission, under the order of the Public Service Commission, Second District, State of New York, of date November 4th, 1909, in Case No. 59.

C. A. BLOOD,
Freight Traffic Manager, New York, N. Y.
132 H. C. BURNETT,
General Freight Agent, New York, N. Y.
J. S. WOOD,
Ass't General Freight Agent, New York, N. Y.

Issued by

T. CLEM BECK,
Chief of Tariff Bureau, New York, N. Y.

Receipt No. 590[illegible]8.

EXHIBIT 26.

P. S. C.-2 N. Y. No. D-1459.

Tariff I. C. C. No. B-4907.

No Supplement to this Tariff will be issued except for the purpose of cancelling the Tariff.

Lehigh Valley Railroad Company.

Freight Tariff of Rules Governing Furnishing of Temporary Doors or Bulkheads for Fruits or Vegetables, in Bulk, in Carloads.

133 1. When cars are furnished for shipments of fruits or vegetables in bulk, in carloads, temporary doors or boards, not less than three feet in height, made of lumber one inch or more in thickness, will be provided by this Company, when doors or lumber are available at shipping point.

2. When temporary doors or boards, not less than one inch in thickness, are furnished by shippers for the shipments of fruits or vegetables in bulk, in carloads, allowance to shippers will be made at the rate of 16 2/3 cents per foot of height of door, or 50 cents per door three feet in height, provided that the maximum allowance per car for temporary doors or boards will not exceed $2.00. If the boards or doors are attached with spaces between the boards the width of the boards will be taken as the measurement for ascertaining the proper allowance to be made to shippers at the rate of 16 2/3 cents per foot of height of doors.

3. If shippers of fruits in bulk, in carloads, elect to furnish bulkheads or bulkhead boards, of not less than one inch in thickness, in

lieu of temporary doors, allowance to shippers for bulkheads or bulkhead boards will be made at the rate of 16 2/3 cents per foot of height of bulkhead, provided that the maximum allowance per car will not exceed $2.00 for bulkheads or bulkhead boards. If the bulkhead or bulkhead boards are made or attached with spaces between the boards the width of the boards will be taken as the meas-
urement for ascertaining the proper allowance to shippers at
134 the rate of 16 2/3 cents per foot of height of bulkhead.

4. If shippers of fruit or vegetables in bulk, in carloads, furnish both temporary doors and bulkheads allowance will be made only for temporary doors as provided in Rule 2.

5. When temporary doors or bulkheads, as the case may be, are furnished by shippers of fruits or vegetables in bulk, in carloads, bills for the above allowances should be rendered monthly to the Freight Agent at point of origin, and the correctness of such bills must be certified to by agents, and forwarded to the General Claim Agent, with statement of billing, for adjustment.

Issued November 24, 1909. Effective November 26, 1909.

(Except as below.) On New York State Shipments, December 26, 1909.

Issued under special permission of the Interstate Commerce Commission, No. 11702, of November 24, 1909.

C. A. BLOOD,
Freight Traffic Manager, New York, N. Y.
H. C. BURNETT,
135 *General Freight Agent, New York, N. Y.*
J. S. WOOD,
Ass't General Freight Agent, New York, N. Y.

Issued by

T. CLEM BECK,
Chief of Tariff Bureau, New York, N. Y.

Receipt No. 59100.
P. S. C.-2 N. Y. No. D-1458.
Tariff No. 7421.

136 *Order of Appellate Division.*

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 14th Day of November, 1911.

Present:

Hon. Peter B. McLennan, Presiding Justice.
" Alfred Spring,
" Pardon C. Williams,
" Frederick W. Kruse,
" James A. Robson,
Associate Justices.

Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs,
vs.
Lehigh Valley Railroad Company, Defendant.

This cause having been brought to trial at a Trial Term of the Supreme Court, held in and for the County of Ontario, on the 20th day of February, 1911, and the Court having, at the close of all the evidence, directed a verdict in favor of the plaintiffs, and the defendant having taken certain exceptions to rulings of the court during said trial, and to the direction of a verdict so made, and the court, having on the 23rd day of February, 1911, duly made 137 an order directing that the defendant's exceptions herein be heard in the Appellate Division, Fourth Department, in the first instance, and ordering that judgment upon the verdict be suspended pending the hearing and determination of such exceptions, and the defendant's motion for a new trial upon such exceptions having come on to be heard before this court on the 12th day of October, 1911, and the court having heard Mr. Lyman M. Bass, of counsel for defendant, in favor of the motion, and Mr. Edward P. White, of counsel for plaintiffs, in opposition thereto, after due deliberation had thereon,

It is hereby ordered, that the defendant's exceptions be, and they hereby are, overruled, defendant's motion for a new trial denied, with costs, and judgment directed for the plaintiffs upon the verdict, with costs. Opinion by McLennan, P. J.

All concur, except Spring, J., and Kruse, J., who dissent in a memorandum by Kruse, J.

Entered 15th day of November, 1911.

NEWELL C. FULTON, *Clerk.*

Supreme Court, Appellate Division, Fourth Judicial Department.

Clerk's Office, Rochester, N. Y.

138 I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within order is a true copy of the original, now on file in this office, and of the whole thereof, and that the original case and papers are hereunto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 15th day of November, 1911.

[L. S.] NEWELL C. FULTON, *Clerk.*

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

Judgment.

139 The issues in this action having been duly brought to trial before Mr. Justice George A. Benton, and a jury at a Trial Term of this court, held in and for the County of Ontario, at the Court House, in Canandaigua, on the 20th day of February, 1911, and the allegations and proofs of the parties having been duly heard and considered, and the defendant having moved for a dismissal of the complaint herein and for the direction of a verdict in its favor, and the court having denied defendant's said motion for a dismissal of the complaint and for the direction of a verdict in its favor, and the jury by direction of the court upon the plaintiffs' motion having rendered a verdict in favor of the plaintiffs, to each of which rulings and directions defendant excepted, and the court having ordered that the exceptions be heard in the first instance at the Appellate Division and that entry of judgment be suspended until the hearing and decision of the Appellate Division upon said exceptions, and such exceptions, together with a motion for a new trial made by the defendant, having been regularly brought on for hearing before the Appellate Division of the Supreme Court for the Fourth Department, and said Appellate Division having on the 15th day of November, 1911, duly ordered that the defendant's exceptions be overruled and that the defendant's motion for a new trial be denied with costs, and that judgment be entered for the plaintiffs upon the verdict with costs, and the remittitur of the Appellate Division in this action having been duly filed in the office of the Clerk of the County of Ontario on the 17th day of November, 1911, and the plaintiffs' costs in both courts having been duly taxed by the Clerk of this court at the sum of $272.35; now, on motion of John Colmey, attorney for the plaintiffs, it is

Adjudged, that the plaintiffs, Leslie G. Loomis, and Leslie G. Loomis, Jr., recover against the defendant, Lehigh Valley Railroad Company, the amount of the verdict, Three Hundred Ninety 140 Two Dollars and Thirty cents ($392.30), with interest from February 23, 1911, to the day of this judgment, amounting to Four Hundred and Nine Dollars and eighty-three cents ($409.83), and the sum of Two Hundred Seventy-two Dollars and thirty-five cents ($272.35), the amount of the plaintiffs' costs as above stated, in all, the sum of Six Hundred Eighty-two dollars and eighteen cents ($682.18), and have execution therefor.

Judgment this 21st day of November, 1911.

H. J. REED, *Clerk.*

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs-Respondents,
against
LEIGH VALLEY RAILROAD COMPANY, Defendant-Appellant.

Please take notice, that the above named defendant hereby appeals to the Court of Appeals from an order of the Appellate Division of the Supreme Court for the Fourth Judicial Department, entered herein in the office of the Clerk of the County of Ontario, on the 17th day of November, 1911.

141 And said defendant also appeals to the Court of Appeals from a judgment entered herein in the office of the Clerk of the County of Ontario, on the 21st day of November, 1911, in favor of the plaintiffs and against the defendant, for the sum of Six Hundred eighty-two dollars and eighteen cents ($682.18), damages and costs, and said defendant appeals from each and every part of said judgment as well as from the whole thereof.

Dated the 6th day of December, 1911.

KENEFICK, COOKE, MITCHELL & BASS,
Attorneys for Defendant-Appellant,
558 *Ellicott Square, Buffalo, N. Y.*

To John W. Colmey, Attorney for Plaintiffs-Respondents, and to the Clerk of the County of Ontario.

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs-Respondents,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant-Appellant.

142 Whereas, on the 17th day of November, 1911, an order of the Appellate Division of the Supreme Court for the Fourth Judicial Department in the above entitled action was entered

in the office of the Clerk of the County of Ontario by the above named plaintiffs, Leslie G. Loomis and Leslie G. Loomis, Jr., by which order the defendant's exceptions taken at the trial of this action, which were ordered to be heard in the Appellate Division of the Supreme Court for the Fourth Judicial Department in the first instance were overruled, and

Whereas, on the 21st day of November, 1911, a judgment was entered in the above entitled action in the office of the Clerk of the County of Ontario by the above named plaintiffs Leslie G. Loomis and Leslie G. Loomis, Jr., and against the above named defendant, Lehigh Valley Railroad Company in the sum of Six hundred eighty-two dollars and eighteen cents ($682.18) damages and costs, and said defendant feeling aggrieved has appealed to the Court of Appeals,

Now therefore, United States Fidelity & Guaranty Company, a surety company, duly authorized by the laws of the State of New York, to execute bonds of suretyship and having its principal office and place of business at Baltimore, Md., and having a general office for the transaction of its business in the State of New York, in the City of Buffalo, Erie County, does hereby undertake, pursuant to the statute in such case made and provided, that the appellant, Lehigh Valley Railroad Company will pay all costs and damages which may be awarded against it on said appeal, not exceeding Five hundred dollars ($500.00) and does also in like manner undertake that if the said judgment appealed from is affirmed or said appeal is dismissed that said appellant will pay or cause to be paid the sum rendered or directed to be paid by the aforesaid judgment or the part thereof as to which it is affirmed. 143

Dated, Canandaigua, N. Y., this 5th day of December, 1911.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By E. CHAPIN CHURCH,
Attorney in Fact.

STATE OF NEW YORK,
County of Ontario, Village of Canandaigua, ss:

On this 5th day of December, 1911, before me personally came E. Chapin Church and Horace W. Fitch, to me known, who being by me duly severally sworn did depose and say, and each for himself, did depose and say, that he resided in the Village of Canandaigua, County of Ontario, New York; that he is the Attorney in Fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the above instrument, being a corporation created and existing under and by virtue of the Laws of the State of Maryland; that it is duly authorized to prosecute a general surety business in the State of New York; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 144

E. CHAPIN CHURCH.
HORACE W. FITCH.

Subscribed and sworn to before me, this 5th day of December, A. D. 1911.

T. Y. VINCENT,
Notary Public.

Court of Appeals.

Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs-Respondents,
vs.
Lehigh Valley Railroad Company, Defendant-Appellant.

Stipulation Waiving Certification and Stipulation in Regard to Exhibits.

It is hereby stipulated, by and between the attorneys for the respective parties herein that the foregoing papers, consisting of order of the Supreme Court, summons and complaint, answer, 145 Clerk's minutes, case and exceptions, order settling case, affidavit of no opinion in the Trial Term, exhibits, order of the Appellate Division for the Fourth Judicial Department, Judgment, notice of appeal to the Court of Appeals and undertaking on appeal, constituting the return to the Court of Appeals, are true copies of and from the originals thereof entered and remaining on file in the office of the Clerk of the County of Ontario, and the whole of said originals, and certification of the same is hereby waived pursuant to the provisions of the statute in such case made and provided.

It is further stipulated, that the same stipulation heretofore entered into by the attorneys for the respective parties herein in regard to exhibits printed at page 117 of this return, is entered into for the purposes of this appeal to the Court of Appeals.

Dated December 7th, 1911.

JOHN COLMEY, *Attorney for Respondents.*
KENEFICK, COOKE, MITCHELL & BASS,
Attorneys for Appellant.

146 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 29th Day of April, in the Year of Our Lord one thousand nine hundred and thirteen, before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, April 30th, 1913.

LESLIE G. LOOMIS & ANO., Respondents,
ag'st
LEHIGH VALLEY RAILROAD CO., Appellant.

Be it remembered, That on the 8th day of December in the year of our Lord one thousand nine hundred and eleven, Lehigh Valley Railroad Co., the appellant in this action, came here into the Court of Appeals, by Kenefick, Cooke, Mitchell & Bass its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order and judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Leslie G. Loomis & ano., the respondents in said action, afterwards appeared in said Court of Appeals by John W. Colmey their attorney.

147 Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Lyman M. Bass of counsel for the Appellant, and by Mr. Edward P. White of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the Judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is modified by reducing recovery to $64.45, and as modified affirmed, without costs in this Court to either party.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, It is considered that the said judgment be modified by reducing recovery to $64.45, & as modified affirmed, without costs to either party as aforesaid. And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justice thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof &c.

R. M. BARBER,
Clerk of the Court of Appeals of the State of New York.

148 & 149 Court of Appeals, Clerk's Office.

ALBANY, April 30, 1913.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said Action in the Court of Appeals, with the papers originally filed therein attached thereto.

[SEAL.] R. M. BARBER, *Clerk*.

Endorsed: Ontario County Clerk's Office. Filed and entered May 12, 1913, 11:20 A. M. H. J. Reed, Dep. Clerk.

150 At a Special Term of the Supreme Court of the State of New York, held in and for the County of Ontario, at the Court House in the City of Canandaigua, Ontario County, N. Y., on the 12th day of May, 1913.

Present, Hon. A. E. Sutherland, Justice Presiding.

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

The above named defendant having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court for the Fourth Judicial Department, entered in the office of the Clerk of the County of Ontario on the 17th day of November, 1911, and from a judgment entered herein in the office of the Clerk of the County of Ontario on the 21st day of November, 1911, in favor of the plaintiffs and against the defendant and the said appeal having been duly argued at the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be modified by reducing recovery to sixty-four dollars and forty-five cents ($64.45) and as modified affirmed without costs in said Court to either party, and having further ordered and adjudged that proceedings therein be remitted to the Supreme Court, there to be proceeded upon according to law; now on reading and filing the remittitur from the Court of Appeals herein and upon motion of Kenefick, Cooke, Mitchell & Bass, attorneys for the defendant, it is

151 Ordered, that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

A. E. SUTHERLAND, *J. S. C.*

Endorsed: Ontario County Clerk's Office. Filed and entered May 12, 1913, 11.20 A. M. H. J. Reed, Dep. Clerk.

152 [Endorsed:] State of New York, Supreme Court, County of Ontario. Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs, vs. Lehigh Valley Railroad Company, Defendant. Order. Kenefick, Cooke, Mitchell & Bass, Attorney- for Defendant, Office and post-office address, 558 Ellicott Square, Buffalo, N. Y. Ontario County Clerk's Office. Filed and entered May 12, 1913, 11.20 A. M. H. J. Reed, Dep. Clerk.

153

Supreme Court, Ontario County.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

A judgment in this action in favor of the plaintiffs and against the defendant having been rendered in this court on the 21st day of November, 1911, in the sum of six hundred eighty-two dollars and eighteen cents ($682.18) damages and costs, upon the order of the Appellate Division, Supreme Court, Fourth Judicial Department, in this action, entered in the office of the Clerk of the County of Ontario on the 17th day of November, 1911, and the defendant having appealed from said judgment and order to the Court of Appeals, and the said Court of Appeals having sent hither its remittitur filed herein on the 12th day of May, 1913, by which it appears that the said Court of Appeals has modified the said judgment by reducing the recovery to sixty-four dollars and forty-five cents ($64.45) and as modified affirmed without costs in said Court to either party and has given judgment accordingly and has remitted the judgment of the said Court of Appeals to this Court, to be enforced according to law, and this Court having by an order duly entered herein on the 12th day of May, 1913, ordered that said judgment be made the judgment of this Court now on motion of Kenefick, Cooke, Mitchell & Bass, attorneys for the defendant, it is

Ordered, adjudged and decreed that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Judgment signed this 12th day of May, 1913.

H. J. REED,
Dep. Clerk.

Endorsed: "Ontario County Clerk's Office. Filed and entered May 12, 1913, 11.20 A. M. H. J. Reed, Dep. Clerk.

154 [Endorsed:] State of New York, Supreme Court, County of Ontario. Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs, vs. Lehigh Valley Railroad Company, Defendant. Judgment. Kenefick, Cooke, Mitchell & Bass, Attorneys for Defendant, Office and post-office address, 558 Ellicott Square, Buffalo, N. Y. Ontario County Clerk's Office. Filed and entered May 12, 1913, 11.20 A. M. H. J. Reed, Dep. Clerk.

155 *Petition for Writ of Error.*

To the Honorable Edward D. White, Chief Justice of the United States, and to the other justices of the Supreme Court of the United States, and to the said Honorable Court:

The petition of Leslie G. Loomis and Leslie G. Loomis, Jr., who reside in the Village of Victor, County of Ontario, and State of New York, respectfully shows:

I. Heretofore and on or about the 10th day of August, 1909, an action was begun in the Supreme Court of the State of New York, for the County of Ontario, by your petitioners, Leslie G. Loomis and Leslie G. Loomis, Jr., as plaintiffs, against the Lehigh Valley Railroad Company, as defendant.

Thereafter the defendant duly appeared and answered, and the issues came on for trial at a trial term of the Supreme Court held in said County, February 20, 1911, before Mr. Justice George A. Benton and a jury, when a verdict was directed and duly rendered for the plaintiffs for the full amount of their claim. The defendant having excepted thereto, its exceptions were ordered to be heard in the Appellate Division, Fourth Department, of said Supreme Court, in the first instance, and thereafter upon a case and exceptions duly settled, the defendant's motion for a new trial upon such exceptions was heard in said Appellate Division, and on the 14th day of November, 1911, the said Court overruled said exceptions, denied said motion, and directed judgment for the plaintiffs upon the verdict, with costs.

II. Thereafter and on or about the 6th day of December, 1911, the defendant appealed from said order of the Appellate Division and the judgment entered thereon, to the Court of Appeals of the State of New York, and said appeal was argued in due course before said Court of Appeals. Upon said appeal the defendant insisted upon the second defense set up in its answer, in which it pleaded the Interstate Commerce Act and certain amendments thereto, and the plaintiffs argued in opposition to said defense that section 22 of the Interstate Commerce Act expressly provided that "nothing in this Act contained shall in any way abridge or alter the remedies previously existing at common law or by statute, but the provisions of this Act are in addition to such remedies," and therefore insisted that the plaintiffs were entitled to maintain their said judgment by virtue of the provisions of said Interstate Commerce Act and the acts amendatory thereof and the laws and Constitution of the United States. The Court of Appeals decided the case April 29, 1913, and its decision together with the prevailing opinion written by Werner, J., and the dissenting opinion of Gray, J., is reported in Volume 208 of the New York Reports at page 312, of which decision and opinions a true copy is hereto annexed. 156

The Court decided that it had no jurisdiction of the interstate items in suit, and accordingly reduced the judgment for the plaintiffs to $64.45, the amount of the intrastate items, and as thus modified affirmed it without costs of said appeal to either party. Thereupon the record was remitted to the Supreme Court of the State of New York in and for said County of Ontario, and on or about May 12, 1913, the remittitur from the Court of Appeals containing its order and judgment as aforesaid was duly filed in the Clerk's office of said County, and on the same day, the said Supreme Court made and granted an order and judgment ordering, adjudging and decreeing that the said order and judgment of the Court of Appeals be and the same thereby were made the order and judgment of said Supreme Court, which order and judgment were 157 entered in said Ontario County clerk's office on the 12th day of May, 1913, as more particularly set forth in the assignment of errors filed herewith.

III. The said Court of Appeals was and is the highest court of the State of New York in which a decision or decree in this suit could be had, and your petitioners allege that said decision was and is against the validity of the Interstate Commerce Act in its true scope and meaning, which Act was drawn in question in said suit, and that said decision was and is against the title, right, privilege and immunity of the plaintiffs specially set up or claimed under the provisions of said Interstate Commerce Act and the laws and Constitution of the United States, and the amendments thereof, to wit: the Seventh, Tenth and Fourteenth Amendments.

IV. Your petitioners therefore complain that in the record and proceedings had in such cause, as well as in the rendition of said decision and the making of an entry of judgment thereon, divers manifest errors have happened to the great prejudice of the said petitioners, as more fully appears from the assignment of errors herewith presented and submitted by them and filed herein.

Wherefore the said petitioners pray and petition for the allowance of a writ of error, and for such other and further order of citation and process as may cause the said errors and each of them to be corrected by the said Supreme Court of the United States.

And your petitioners pray for a reversal of so much of the judgment as is complained of in the assignment of errors herewith presented and for the correction of the errors so complained of, and for the affirmance of the original judgment of the trial court in 158 full with costs of all the courts, and for such other, further, and proper relief as may be just in the premises, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioners will ever pray.

Dated Buffalo, N. Y., this 28th day of February, 1914.

EDWARD P. WHITE,
Attorney for Plaintiffs-in-Error.

Office and P. O. Address, 921 Marine Bank Building, Buffalo, N. Y.

Let the writ issue.
March 5, 1914.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the U. S.

159 Court of Appeals, State of New York.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Respondents,
against
LEHIGH VALLEY RAILROAD COMPANY, Appellant.

(Argued March 6, 1913; decided April 29, 1913, Reported 208 N. Y. 312.)

Statement of Case.

Appeal from a judgment entered November 21, 1911, upon an order of the Appellate Division of the Supreme Court in the fourth judical department overruling defendant's exceptions, ordered to be heard in the first instance by the Appellate Division, denying a motion for a new trial and directing judgment for plaintiffs upon the verdict rendered in their favor at the Trial Term.

The action was brought to recover the cost of lumber which the plaintiffs, as shippers of produce over defendant's railroad, bought and used for the purpose of making certain freight cars furnished by the defendant suitable for such shipments. At the Trial Term the court directed a verdict for the amount of the plaintiffs' claim, and denied defendant's motion for the direction of a verdict in its favor. The exceptions to these rulings were ordered heard at the Appellate Division in the first instance, where they were overruled, and the present appeal is from the judgment entered upon that disposition of the case.

160 The plaintiffs are copartners in the business of buying, selling and shipping grain, apples, potatoes, onions, cabbage and other farm products, and their principal office is at Victor, N. Y. The defendant is a railroad corporation organized under the laws of the state of Pennsylvania, and is a common carrier which solicits and accepts such products for transportation over its road from its stations at Victor, Farmington, Stanley, Mendon, Henrieeta, East Rush, Cedar Swamps, Rochester Junction, Clifton Springs, North Le Roy and other places in the state of New York to other points in the United States, both within and without the state of New York. The plaintiffs buy the grain and produce from farmers who draw it to the railroad stations in their respective localities, where it is loaded into box cars for shipment in bulk. In order to load such cars to the minimum capacity upon which the freight rates are based, and the maximum to which the shipper is entitled, it is necessary that they should be equipped with grain doors or bulkheads. Grain doors consist of boards cut to the proper length for nailing on the inside of the cars at the regular doors, which are on the sides of the cars midway between the ends. The regular car doors are either of the sliding or swinging type, and the purpose of the grain doors in either case is to permit the loading of the cars to their proper capacity, to safely contain the load, and to enable the unloading to be done without unnecessary waste or inconvenience.

These grain doors are sometimes called bin doors, and that characterization at once explains their use. The loading of grain and produce in bulk begins at the two ends of the cars, and as the accumulating volume seeks a level which brings it to the open doors, the bin boards are attached one after another as the load increases until the proper height is reached. Thus the produce is kept from leaking in transit, and saved from waste during the process of
161 loading and unloading. Bulkheads served the same purpose, the only difference being that in their use the two ends of the cars are converted into two separate bins. In that case the bin boards, instead of being nailed lengthwise of the cars to close the door openings, are placed transversely of the cars on either side of these openings so as to leave a passage between them.

For many years prior to 1906 it had been the custom of the defendant to furnish cars fitted with grain doors for the shipment of produce in bulk, or the lumber from which the shipper could make grain doors or bulkheads, and for this purpose lumber had been placed from time to time at the various stations where the shipper could help himself to what he needed. The same custom prevailed on other railroads in various parts of the country.

From August, 1906, to May, 1908, the plaintiffs continued, as before, to bring to the defendant for transportation carload lots of produce to be sent in bulk, which the defendant continued to receive but for which it neglected and refused either to furnish cars fitted with grain doors or bulkheads or the lumber wherewith to construct the same, although the plaintiffs demanded proper cars for the protection and transportation of their shipments. Upon the defendant's refusal to comply with these demands, the plaintiffs bought and used the necessary lumber to construct the grain doors and bulkheads in the various cars which are enumerated in Schedule "A" annexed to the complaint. The sums thus expended averaged $1.60 per car and amounted to a total of $322.07, for which the plaintiffs presented to the defendant a statement with demand of payment which was refused. Thereupon this action was brought with the result above stated.

None of the facts essential to the plaintiffs' alleged cause of action are controverted either in the defendant's answer or in the
162 evidence. The defendant relies upon the assertion (1) that it was under no common-law duty to furnish to the plaintiffs cars equipped with grain doors, bin doors or bulkheads, and (2) that even if such a duty had ever existed it had been abolished by the provisions of the Interstate Commerce Act of February 11th, 1887, and the Elkins Act of February 19th, 1903, and the Public Service Commission's Act of the state of New York (L. 1907, Ch. 429), pursuant to which the defendant had filed tariffs of rates which contained no provision for payments or allowances to shippers for grain doors, bin doors or bulkheads placed in cars by them.

The particular sections of the Public Service Commission's Act of the state of New York, (L. 1907, Ch. 429) upon which the defendant relies are sections 28, 33 and 49, of which we shall quote only the pertinent parts.

Section 28 provides for the filing and publication of tariff schedules which shall set forth, among other things "the places between which property and passengers will be carried, and shall also contain the classification of passengers, freight or property in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed, and any rules or regulations which may in any wise change, affect or determine any part or the aggregate of, such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

Section 31 provides: "No common carrier shall, directly or indirectly, by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person or corporation a greater or less compensation for any service rendered or to be rendered in the transportation of passengers, freight or
163 property, except as authorized in this act, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions."

Section 33 directs that "No common carrier shall charge, demand, collect or receive a greater or less or different compensation for transportation of passengers, freight or property, or for any service in connection therewith, than the rates, fares and charges applicable to such transportation as specified in its schedules filed and in effect at the time; nor shall any such carrier refund or remit in any manner or by any device any portion of the rates, fares, or charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are regularly and uniformly extended to all persons and corporations under like circumstances."

Section 49 declares: "Whenever either commission shall be of opinion, after a hearing, had upon its own motion, or upon a complaint that the rates, fares or charges demanded, exacted, charged or collected by any common carrier, railroad corporation or street railroad corporation subject to its jurisdiction for the transportation of persons or property within the state, or that the regulations or practices of such common carrier, railroad corporation or street railroad corporation affecting such rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, or in any wise in violation of any provision of law, * * * the commission shall determine the just and reasonable rates, fares and charges * * * to be charged * * * . And whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier, railroad corporation or
164 street railroad corporation in respect to transportation of persons or property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the

just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and services thereafter to be in force."

The foregoing excerpts from the Public Service Commission's Law of this state are, of course, germane only to the intrastate shipments made by plaintiffs over the defendant's road: and of such shipments there are only 29 as against 172 interstate shipments, to which the provisions of the Interstate Commerce Act are applicable.

The various parts of the Interstate Commerce Act, and its amendments, which bear upon the contentions of the parties with reference to interstate shipments, are section 1, paragraph 1, which provides: "That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or Territory."

Section 1, par. 2, which defines the term "transportation" to mean "cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Section 6, par. 1, which provides for the filing, printing and posting of schedules of rates by common carriers which "shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight
165 in force, and shall also state separately all terminal charges,
storage charges, icing charges and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee."

Section 6, par. 7, which provides that; "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Section 9, which provides: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for

the recovery of the damages for which such carrier may be liable
under the provisions of this act in any District or Circuit Court of the
United States of competent jurisdiction; but such person or
166 persons shall not have the right to pursue both of such remedies and must in each case elect which one of the two methods
of procedure herein provided for he or they will adopt."

By section 1, par. 1, of the Elkins Act, which went into effect in 1903, carrier corporations, as well as their officers and agents, are subjected to criminal prosecution and penalties for the wilful failure to file and publish the tariffs or rates and charges required by the Interstate Commerce Act; and it is declared to be "unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept, or receive any rebate, commission, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced."

In paragraph 2 of the same section of the Elkins Act it is provided that "Whenever any carrier files with the Interstate Commerce Commission, or publishes a particular rate under the provisions of the act to regulate commerce or the acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom shall be deemed to be an offense under this section of the act."

Further facts appear in the opinion.

Lyman M. Bass and Thomas R. Wheeler for appellant.

Edward P. White and John Colmey for respondents.

167 WERNER, *J.:*

The first question to be considered is whether, independently of the Federal and State statutes, the defendant was subject to a common-law duty to its shippers to furnish them cars equipped with bin doors or bulkheads for the shipment of grain and other produce in bulk. This question need not be discussed at length. It is the settled law that a common carrier must provide itself with vehicles which are safe and sufficient for the purpose intended. (Hutchinson on Carriers, sec. 497; Cin. N. O. & T. P. Ry. Co. v. Fairbanks & Co. 90 Fed. Rep. 467; Chicago & Alton R. R. Co. v. Davis, 159 Ill. 53.) We are not now considering the matter of rates, tariffs or regulatory legislation, but the primary duty of the carrier to do that which he undertakes to do. When a carrier solicits and receives produce for shipment in bulk, the law implies the obligation to furnish cars which are reasonably fit for that service; and when the carrier fails in that duty, to the damage of the shipper, the

latter may ordinarily invoke his remedy at law to recover the loss which results from the dereliction of the former. There are instances, however, in which the predicament of the shipper and the degree of the carrier's dereliction are elements to be considered in determining the remedy to be applied. When the shipper brings his produce to a country station, where there are no facilities for storage, and discovers that the carrier has furnished cars which are not fit for their intended service, but which can be made so by a trifling expenditure of labor and money, it is but reasonable that the shipper should be permitted, for the advantage of both, to perform the initial duty of the carrier, and charge it with the fair expense. Any other course would entail upon both unnecessary hardship and loss. The carrier could be mulcted in damages out of all proportion to its slight infraction of duty, and the shipper
168 subjected to losses, under his contracts with others, not within the scope of the carrier's agreement, and thus irremediable. These considerations, and others of mutual convenience, are doubtless responsible for the long standing and practically universal custom in this part of the country of permitting the shippers of grain and produce in bulk to equip cars furnished for such service with the necessary bin doors or bulkheads when the carrier has failed to do so. The record discloses that for many years prior to 1906 it had been the custom for the defendant and of other railroads in this state to furnish shippers of grain and produce in bulk the lumber with which to convert ordinary freight cars into suitable conveyances for such shipments, and that without the addition of bin doors or bulkheads such cars are not suitable for the service. It appears that they cannot be loaded to the minimum capacity upon which the freight rate is based, or the maximum which, in the interest of the shipper, they are designed to hold. If the shipment happens to be grain, the load naturally gravitates to the level at the car doors, where the pressure may create a space through which the load is jolted out in transit. And in unloading there is also a degree of waste and inconvenience, because a car laden with grain or other loose produce, and not equipped with bin doors or bulkheads, cannot be opened without spilling some of its contents. As to the shipments set forth in the schedule annexed to the complaint the defendant refused, after demand by the plaintiffs, to equip its cars with the necessary appliances. Without them the cars were practically useless. We think that, in these circumstances, the plaintiffs were justified in furnishing the necessary lumber, and that for the concededly reasonable expense incurred by them they are entitled to recover from the defendant, unless the provisions
169 of our Public Service Commissions Law or of the Interstate Commerce Act have established a different rule.

In view of the legislation to which we have referred, the subject under discussion naturally divides itself into two distinct branches. The one relates to intrastate shipments, and the effect of our state legislation upon the common-law rights and obligations of the parties, and the other refers, of course, to interstate transportations in respect of which the effect of the Federal statutes is to be considered.

The defendant relies upon certain provisions of the Public Service Commissions Law to exempt it from the liability to which it has thus far been held for the expense which the plaintiffs incurred in fitting, for bulk shipments of grain and other produce, the 29 cars which were used in intrastate traffic. We are referred to parts of sections 28, 31 and 49 of the act, which we have quoted; but we find in them nothing which is directly controlling of the question. Section 28 deals with the matter of publishing tariff schedules, which shall "state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require to be stated, all privileges or facilities granted or allowed," and any rules or regulations which may affect or determine rates, "or the value of the service rendered to the * * * shipper." Section 31 forbids unjust discrimination, rebate, drawback, or other device by which one shipper may be favored in service or charges over other shippers in similar conditions; and section 49 provided that "whenever the commission shall be of opinion, after a hearing, had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances, or service of any such common carrier * * * in respect to transportation of * * * property within the state are unjust, unreasonable, unsafe, improper or inadequate, the commission shall determine the just, reasonable, safe, adequate and proper regulations, practices, equipment, appliances and service thereafter to be in force," etc. A closer view of these sections reveals their inapplicability to the precise question here involved. This is not a case of unjust discrimination against the shipper; nor yet a case in which there has been a hearing by the commission, either upon its own motion or upon complaint, as to the practices, equipment or service of the carrier; nor even a case in which there was any action by the commission arising out of the carrier's failure to promulgate tariff schedules stating, among other things, the "privileges or facilities granted or allowed" to the shipper. We are concerned in this action with the antecedent duty of the carrier to furnish "sufficient and suitable cars for the transportation of such freight in carload lots" (Section 37) with reference to which the commission had not acted at the time when this controversy arose. Primarily the question is not one of rates or regulations at all, but of the carrier's failure to perform its initial duty to give the shipper cars fit for the service for which they were furnished. That is obviously a duty with reference to which the commission has power to make rules and regulations and even rates, but until it acts within the scope of its powers the subject is one of which our courts have cognizance under the general rules of law. Except for the small amount involved in this branch of the case the question is of merely academic interest, for the commission has since had a hearing upon the complaint of the New York State Shippers Protective Association against this defendant, impleaded with other railroad corporations, and has decided that "the legal duty of the carrier to furnish a suitable car for the transportation of either grain, potatoes or other bulk produce, includes provision of a proper inside guard for the carload." Under that decision, which was rendered in November,

170

171

1909, all common carriers of such bulk shipments are now required to furnish cars equipped with inside or grain doors, bulkheads, or other proper devices, so that loading or unloading may be accomplished with reasonable facility; or, in the alternative, if the carrier and shipper deem their convenience best served by allowing the shipper to furnish these appliances, the carrier may make a stated allowance therefor, not less than the full average cost thereof, which shall be stated in its published tariffs, and shall leave to the shipper the option to supply either grain doors or bulkheads. In common with other carriers within the state, the defendant has so amended its tariff schedules as to comply with this decision, and the commission has fixed the rates with reference to this practice. The question is now one of rates, because the commission, acting within the range of its powers, has made it so. The carrier is given the alternative of furnishing a car suitable for shipment of bulk produce, or of permitting the shipper to do so, but in either event the tariff schedules filed by the carrier must disclose the uniform charges in the one instance, and the uniform allowance in the other. This power of fixing rates and making regulations concerning intrastate traffic is clearly within the jurisdiction of our state public service commission, but their determinations are not retroactive. It is true that the commission did not act until November, 1909, with reference to the shipment of cars used in intrastate shipments of produce in bulk, but it is that very fact which, in our judgment, left unaffected the jurisdiction of our state courts to deal with the question until the commission had exercised its power over
172 the subject. These views lead to the conclusion that the plaintiffs are entitled to recover the money expended by them in equipping with grain doors and bulkheads the intrastate cars set forth in the schedule annexed to the complaint.

The view which we are to take of the rights of the plaintiffs in respect of their interstate shipments is necessarily governed by considerations entirely different from those which have led to our conclusion as to the intrastate shipments. Here we are upon different ground, for we are now dealing with Federal statutes and with the decisions of Federal courts in demarking their effect and interpretation. If the subject is covered by the enactments of Congress, and if the Federal courts or tribunals are invested with jurisdiction over it, our jurisdiction is at an end, without regard to what it may have been at common law or under our own statutes. The first thing to be noticed is that the Interstate Commerce Act and the acts auxiliary thereto are much more comprehensive and drastic than our Public Service Commissions Law. Section 2 of the Interstate Commerce Act defines the term "transportation" as meaning "cars and other vehicles and all instrumentalities and facilities of shipment and carriage" and all services in connection therewith and in the "handling of the property transported." Section 6, par. 1, directs the making, printing, filing and posting of tariff schedules "which shall plainly state the places between which property * * * will be carried, * * * the classification of freight in force, * * * all terminal charges, storage charges

and icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed." The same section, par. 7, prohibits any carrier from engaging in interstate traffic unless the tariff schedules have been promulgated as stated,
and forbids any different or other charge or compensation
173 than the published rate, or the taking of any different rates
than those specified. Section 1, par. 2, of the Elkins Act subjects all corporations and their officers and agents to prescribed penalties for any violation of any of the foregoing provisions, and paragraph 2 of the same section makes it a punishable offense to even offer to depart from the rates thus established. Section 9 of the Interstate Commerce Act provides: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damage for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt." There are other sections of the statutes which have a bearing, but we have quoted enough to make it clear that the general subject is one of which the Congress of the United States has assumed control. It has enacted a statute giving to any person claiming to have been damaged by any carrier subject to the act, his choice of two tribunals in which his grievance may be considered and decided. He may go in the first instance to the Interstate Commission, or he may sue in the Federal courts, but he must choose between these two. Congress has not only acted in the premises, but it has prescribed in terms which indicate an intention to exclude all others, the tribunals to which the claimant must address himself. This is what accentuates the distinction between the interstate and the intrastate
questions. In this state, under our own statute the question
174 is whether our commission has acted upon a subject which,
although involving the common-law duty of furnishing proper cars, could be brought into the sphere of rates by proper administrative action; and that, as we have seen, was not done until after the period covered in the complaint. Under the Federal statute, the question is not whether the Interstate Commission has acted, but whether Congress has assumed such control of this feature of interstate commerce as to divest our state courts of the jurisdiction which they had before the Federal statutes were enacted. Upon that question there is little we can say, except to cite the decisions of the Supreme Court which very plainly speak for themselves. In the recent case of Chicago, R. I. & Pac. Ry. Co. v. Hardwick Farmers' Elevator Co. (226 U. S. 426) that court considered the effect of the Interstate Commerce Act, upon the Minnesota Reciprocal Demurrage Law under which railroad carriers were subjected, upon the demand of the shipper, to a demurrage charge of $1.00 per car for each day's delay in furnishing cars, and also

a reasonable attorney's fee. In discussing the Interstate Commerce Act and its effect upon the Minnesota statute, Chief Justice White spoke for the court as follows: "As legislation concerning the delivery of cars for the carriage of interstate traffic was clearly a matter of interstate commerce regulation, even if such subject was embraced within that class of powers concerning which the state had a right to exert its authority in the absence of legislation by Congress, it must follow in consequence of the action of Congress to which we have referred that the power of the state over the subject-matter ceased to exist from the moment that Congress exerted its paramount and all-embracing authority over the subject. We
say this because the elementary and long-settled doctrine
175 is that there can be no divided authority over interstate
commerce and the regulations of Congress on that subject are supreme. It results, therefore, that in a case where from the particular nature of certain subjects the state may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the state impotent to deal with a subject over which it had no inherent but only a permissive power." (p. 435.)

To the same effect is the case of Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co. (204 U. S. 426) where the question was one of rates. The syllabus very succinctly paraphrases the opinion as follows: "The Interstate Commerce Act was intended to afford an effective and comprehensive means for redressing wrongs resulting from unjust discrimination and undue preference, and to that end placed upon carriers the duty of publishing schedules of reasonable and uniform rates; and, consistently with the provisions of that law, a shipper cannot maintain an action at common law in a State Court for excessive and unreasonable freight rates exacted on interstate shipments where the rates charged were those which had been duly fixed by the carrier according to the act, and had not been found to be unreasonable by the Interstate Commerce Commission." The same rule was laid down in Southern Ry. Co. v. Reid (222 U. S. 424) where there was a conflict between the Interstate Commerce Law and a statute of North Carolina imposing a penalty upon carriers for any refusal to receive freight at any regular station or to forward the same by a route selected by the person tendering the same; and in Northern Pac. Ry. Co. v. Washington (222 U. S. 370, 378) it was held that the "Hours of Service Law" applicable
to railroads engaged in interstate traffic; passed by Congress
176 in 1907, although not to take effect for a year after its enact-
ment, at once superseded the state statutes relating to the subject. Here again the Supreme Court, speaking through Chief Justice White, announced it as "elementary * * * that the right of a State to apply its police power for the purpose of regulating interstate commerce * * * exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power."

It would add to the discussion nothing but increased length to quote more from the many cases which deal with this subject. We cite a few which fully sustain the foregoing expressions of the Supreme Court, and others which clearly show that the subject-matter involved in the case at bar is regarded as being under the control of the Federal commission. (McNeill v. Southern Ry. Co., 202 U. S. 543; Atlantic Coast Line R. Co. v. Macom Grocery Co., 166 Fed. Rep. 206; affd., 215 U. S. 501; B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S. 481; Morrisdale Coal Co. v. Penn. R. R. Co., 176 Fed. Rep. 748; Clement v. Louisville & N. R. R. Co., 153 Fed Rep. 979; D. & R. G. R. R. Co. v. Baer Bros. Mer. Co. 187 Fed Rep. 485.) Neither would it be profitable to dwell at length upon the difference, contended for by plaintiff's counsel, between a question of rates and a carrier's common-law duty to furnish cars suitable for the traffic in which he engages. Conceding its existence and admitting the abstract soundness of the argument, the fact remains that Congress has made it a question of rate over which the Interstate Commerce Commission has exclusive control, and in respect of which any justiceable controversy is referred exclusively to the Federal Courts. There are many cases in which the state courts may enforce a right of action arising under an act of Congress, but only when the act
177 expressly confers such jurisdiction or is silent upon the subject. This rule and the reasons upon which it rests are well stated in Galveston, H. & S. A. Ry. Co. v. Wallace (223 U. S. 481, 490): "Statutes have no extra-territorial operation, and the courts of one government cannot enforce the penal laws of another. At one time there was some question both as to the duty and power to try civil cases arising solely under the statutes of another State. But it is now recognized that the jurisdiction of State Courts extends to the hearing and determination of any civil and transitory cause of action created by a foreign statute, provided it is not of a character opposed to the public policy of the State in which the suit is brought. When the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the State governments, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already possessed by them, and under which they had the power to hear and determine causes of action created by Federal Statute." That was written in a case involving the liability of an initial carrier for non-delivery of goods by the connecting carrier, and in which it was held that the damages caused by the failure to deliver the goods were not traceable to a violation of the Interstate Commerce Law. To the same effect are Missouri Pac. Ry. Co. v. Larabee Flour Mills Co. (211 U. S. 612) and N. Y., N. H. & H. R. R. Co. v. New York (165 U. S. 628). In the Second Employers' Liability Cases (223 U. S. 1, 57) the jurisdiction of the state courts under the Federal Employers' Liability Law was recognized upon the distinct ground that the statute gave the Circuit Courts of the United States jurisdiction that is not

exclusive, but only concurrent with the jurisdiction of the
178 courts of the several states.

We have yet to consider whether we can divide the single judgment recovered by the plaintiffs, so as to sustain that part predicated upon the intrastate shipments, and to disallow for lack of jurisdiction that part which rests upon the interstate shipments. The general rule in actions at law is that upon appeal from a single judgment the appellate court must affirm or reverse as to the whole of the recovery and as to all the parties. (Goodsell v. Western Union Tel. Co., 109 N. Y. 147; Wolstenholme v. Wolstenholem File Mfg. Co., 64 id. 272; Nat. Bd. of Marine Underwriters v. Nat. Bank of the Republic, 146 id. 64.) The reason of the rule is that it would produce endless confusion and embarrassment in the administration of justice to permit single causes of action and judgments to be split up so that different parts thereof could be in litigation in different courts at the same time. We do not think this case is within the reason of the rule. Although there is no separation of causes of action either in the complaint or in the judgment, there are manifestly two such causes if we are right in holding that there is a distinction between intrastate shipments and interstate shipments. They are easily separable. The result of our decision is that the plaintiffs are entitled to recover upon one and not upon the other. In these circumstances it is both logical and just to make an end to the litigation by directing that the judgment shall be reduced to $64.45, and as thus modified affirmed, without costs of this appeal to either party. (Wolstenholem v. Wolstenholem File Mfg. Co., supra; Board of Underwriters v. Nat. Bank of the Republic, supra.)

179 Gray, *J.* (dissenting):

I am of the opinion, if, as it is conceded, the common-law duty of the defendant in this case extended to the furnishing of cars sufficiently equipped for the carriage of the plaintiff's produce, that the obligation existed at the place of shipment and was enforceable, whatever the destination of the freight. The argument that the interstate commerce acts confer exclusive jurisdiction upon the Federal Courts to determine claims and cases of infractions of agreements relating to shipments beyond state lines does not impress me as sound in its application to the present case, I think that the courts of this state did not lose their jurisdiction to enforce the obligation, which arose, or was implied, in the transaction between the parties. In the cases decided by the United States Supreme Court, to which Judge Werner refers in his opinion, the states had enacted laws which operated in regulation of the duties and obligations of carriers of interstate tarffic. This case does not present a question where the state has undertaken to exert its authority over subject-matters, which, by congressional action, had been brought within Federal control.

For these reasons, briefly I dissent.

Cullen, Ch. J., Willard Bartlett, Chase, Collin and Hogan, J. J. concur with Werner, J.; Gray, J., reads dissenting opinion.

Judgment accordingly.

180 [Endorsed:] 19573. U. S. Supreme Court. Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs-in-Error, against Lehigh Valley Railroad Company, Defendant-in-Error. Petition for Writ of Error, with Copies of Opinions Rendered in the Court of Appeals, State of New York. Edward P. White, Attorney for Pl'ffs-in-Error, 921-927 Marine National Bank Building, Buffalo, N. Y. (Original.) Ontario County Clerk's Office. Filed Mar. 11, 1914. H. J. Reed, Dep. Clerk.

181 *Assignment of Errors.*

Supreme Court of the United States.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs in Error,
against
LEHIGH VALLEY RAILROAD COMPANY, Defendant in Error.

And now come Leslie G. Loomis and Leslie G. Loomis, Jr., plaintiffs in error, and make and file this their assignment of errors:

1. The Court of Appeals of the State of New York erred in not affirming in full with costs the judgment herein entered in the Supreme Court of said State in and for Ontario County, November 21, 1911, in favor of the plaintiffs for $409.83 damages and $272.35 costs, in all the sum of $682.18, from which judgment the defendant appealed to said Court of Appeals.

2. The said Court of Appeals erred in not affirming in full with costs the order herein made by the Appellate Division of the Supreme Court in and for the Fourth Department of the State of New York and entered in the office of the clerk of Ontario County, November 17, 1911, directing judgment for the plaintiffs as above-stated.

3. The said Court of Appeals erred in making and entering its order and judgment herein filed in the said office of the clerk of Ontario County, May 12, 1913, ordering and adjudging that said judgment of November 21, 1911, amounting to $682.18, be modified by reducing the recovery to $64.45 and as modified affirmed
182 without costs in said Court to either party.

4. The said Court of Appeals erred in reducing the recovery of damages under said judgment from $409.83 to $64.45, and in disallowing and denying any recovery of damages in respect to cars used for interstate shipments.

5. The said Court of Appeals erred in deciding and adjudging that the Courts of the State of New York had no jurisdiction to award damages in this action in respect to cars used for interstate shipments.

6. The said Court of Appeals erred in deciding and adjudging that "Congress has assumed such control of this feature of interstate commerce as to divest our state courts of the jurisdiction which they had before the federal statutes (mentioned by the Court) were enacted."

7. The said Court of Appeals erred in deciding and adjudging in respect to a carrier's common-law duty to furnish cars suitable for

the traffic in which he engages, "that Congress has made it a question of rates over which the Interstate Commerce Commission has exclusive control, and in respect of which any justiciable controversy is referred exclusively to the federal courts."

8. The said Court of Appeals erred in overruling the opinion of Gray, J., that "if, as it is conceded, the common-law duty of the defendant in this case extended to the furnishing of cars sufficiently equipped for the plaintiffs' produce, the obligation existed at the place of shipment and was enforceable, whatever the destination of the freight," and that "this case does not present a question where the state has undertaken to exert its authority over subject-matters, which by congressional action had been brought within federal control," and the said Court erred in rendering judgment to
183 the contrary.

9. The said Court of Appeals erred in deciding and adjudging that the term "transportation" as defined in the Interstate Commerce Act covered or included the materials or services furnished or rendered by the plaintiffs in equipping any of the cars in suit.

10. The said Court of Appeals erred in deciding and adjudging that the provisions of section 9 of said Interstate Commerce Act applied to the subject-matter of this action or to any part thereof or to any of the damages in suit.

11. The said Court of Appeals erred in deciding and adjudging that any of the provisions of the Interstate Commerce Act or the acts amendatory thereof, or of the so-called Elkins Act, approved February 19, 1903, or any other act of Congress, prohibited or prevented the recovery of damages in this action as awarded by the trial court in the judgment appealed from.

12. The said Court of Appeals erred in rendering judgment as aforesaid contrary to the following provision of section 15 of the Interstate Commerce Act, to wit: "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable," etc.

13. The said Court of Appeals erred in rendering judgment as aforesaid contrary to the following provisions of section 22 of the Interstate Commerce Act, to wit: "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

184 14. The order and judgment of the Supreme Court of the State of New York entered in the clerk's office of Ontario County on the 12th day of May, 1913, ordering and adjudging that the said order and judgment of the Court of Appeals be made the order and judgment of said Supreme Court, was erroneous in the various respects above-mentioned, and said Supreme Court likewise erred in the same particulars as did the said Court of Appeals as above set forth.

15. The said judgment of said Court of Appeals, and of said Su-

preme Court, is manifest error in that it deprives the plaintiffs in error of their right to trial by jury and requires certain facts tried by a jury herein to be re-examined otherwise than according to the rules of the common law, in violation of the Seventh Amendment of the Constitution of the United States.

16. The said judgment is contrary to law and to the Tenth Amendment of said Constitution in that it violates and invalidates the powers thereby reserved to the States respectively and the people thereof.

17. The said judgment is contrary to law and to the Fourteenth Amendment of said Constitution in that it deprives the plaintiffs in error of their property without due process of law and denies them the equal protection of the laws.

Dated Buffalo, N. Y., February 28, 1914.

EDWARD P. WHITE,
Attorney for Plaintiffs-in-Error.

Office and P. O. Address, 921 Marine Bank Building, Buffalo, N. Y.

185 [Endorsed:] 19573. U. S. Supreme Court. Leslie G. Loomis and Leslie G. Loomis, Jr., Plaintiffs-in-error, against Lehigh Valley Railroad Company, defendant-in-error. Assignment of errors. (Original.) Edward P. White, Attorney for pl'ffs-in-error, 921-927 Marine National Bank Building, Buffalo, N. Y. Ontario County Clerk's Office. Filed Mar. 11, 1914. H. J. Reed, Deputy Clerk.

186 Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Supreme Court of the United States.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., Plaintiffs in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY, Defendant in Error.

Know all men by these presents, that the Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland, having an office at No. 1200 Morgan Building, Buffalo, N. Y., and having authority to transact business, pursuant to the act of Congress, August 13th, 1894, entitled 'An act relative to cognizances, stipulations, bonds and undertakings, and to allow certain corporations to be accepted as surety therein,' is held and firmly bound unto the Lehigh Valley Railroad Company in the sum of Five Hundred Dollars ($500), for the payment of which, well and truly to be made unto the said Lehigh Valley Railroad Company, its successors and assigns, the said Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, firmly by these presents; upon condition nevertheless, that

Whereas, the above-named plaintiffs in error seek to prosecute their writ of error to the Supreme Court of the United States to reverse and modify the judgment rendered in the above entitled action by the Court of Appeals of the State of New York,

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error shall prosecute their said writ of error to effect, and if they fail to make their plea good, shall answer all costs, then this obligation shall be void, but shall
187 otherwise remain in full force and virtue.

In witness whereof, the said Fidelity and Deposit Company of Maryland has caused these presents to be signed by its attorney-in-fact and its corporate seal to be hereunto affixed this 2nd day of March, in the year nineteen hundred and fourteen.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
[SEAL.] By CHARLES A. WHITE,
Attorney-in-fact.

Approved March 5, 1914.
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the U. S.

188 STATE OF NEW YORK,
County of Erie, ss:

I, Simon A. Nash, Clerk of the County of Erie, and also Clerk of the Supreme and County Courts for said County, the same being Courts of Record, do hereby certify that Paul A. White, whose name is subscribed to the certificate of the proof, acknowledgment or affidavit of the annexed instrument in writing, was, at the time of taking such proof, acknowledgment or affidavit, a commissioner of deeds in and for the City of Buffalo, in said County, duly commissioned and sworn and authorized to take and certify the same; and further, that I am well acquainted with the handwriting of such Commissioner of Deeds, and verily believe the signature to the said certificate of proof, acknowledgment or affidavit is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of said County and Courts, at Buffalo, this 12 day of Mar., 1914.

[SEAL.] S. A. NASH, *Clerk.*

No. 2500.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

On the 2nd day of March, in the year one thousand nine hundred and fourteen before me personally came Charles A. White, to me known, who, being by me duly sworn, did depose and say that he resides in the City of Buffalo, New York, that he is the Attorney-in-fact of the Fidelity and Deposit Company of Maryland, the corporation described in and which executed the above instrument: that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the

Board of Directors of said corporation, and that he signed his name thereto by like order.

PAUL A. WHITE,
Commissioner of Deeds in and for the
City of Buffalo.

Fidelity and Deposit Company of Maryland.

Resolution of Board of Directors.

At the regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held at the office of said Company in the City of Baltimore, Md., on the 5th day of March, 1913, at which were present a quorum of said Directors duly authorized to act in the Premises, on motion, it was unanimously

"Resolved, That Charles A. White and Paul A. White, both of the City of Buffalo, N. Y., be and each of them hereby is appointed Attorney-in-fact of the Fidelity and Deposit Company of Maryland in and for the State of New York, and there is hereby vested in them, and each of them full right, power and authority to execute, sign, seal and deliver in the name and on behalf of said Company, any and all bonds, obligations and undertakings required in Judicial Proceedings, in any and all Courts in the State of New York and in the United States Circuit and District Courts in said State, and we hereby ratify, approve and confirm all that our said Attorneys or either of them may do or lawfully cause to be done in the premises by virtue of the authority herein conferred.

Certificate.

I, Wm. R. Bishop, Assistant Secretary of the Fidelity and Deposit Company of Maryland, do hereby certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and that the same is a true and correct copy of the said original resolution, and of the whole thereof.

Given under my hand and the seal of said Company, at the City of Baltimore, Md., this 26th day of December, 1913.

[Seal of Fidelity & Deposit Company of Maryland, Incorporated 1890.]

WM. R. BISHOP,
Assistant Secretary.

Endorsed: Filed Mar. 13, 1914. H. J. Reed, Dep. Clerk.

189 [Endorsed:] Surety Bonds. Supreme Court of the United States. Leslie G. Loomis and Leslie G. Loomis, Jr., pl't'ffs in error, vs. Lehigh Valley Railroad Company, def't. in error. Undertaking on writ of error. Copy. Charles A. White, Attorney and General Agent, 1200 D. S. Morgan Bldg., Buffalo, N. Y. Fidelity and Deposit Company of Maryland, Baltimore, Maryland.

190 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Leslie G. Loomis and Leslie G. Loomis, Jr., and Lehigh Valley Railroad Company, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said Leslie G. Loomis and Leslie G. Loomis, Jr., as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done. 191

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifth day of March, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

192 [Endorsed:] 19573. Supreme Court of the United States, October Term, 1913. Leslie G. Loomis and Leslie G. Loomis, Jr., vs. Lehigh Valley Railroad Company. Writ of error. Ontario County Clerk's Office. Filed Mar. 11, 1914. H. J. Reed, Dep. Clerk.

193 UNITED STATES OF AMERICA, *ss*:

To Lehigh Valley Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York, wherein Leslie G. Loomis and Leslie G. Loomis, Jr., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this fifth day of March, in the year of our Lord one thousand nine hundred and fourteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

194 [Endorsed:] 19573. Ontario County Clerk's Office. Filed Mar. 13, 1914. H. J. Reed, Dep. Clerk.

Due and personal service of the within citation is hereby admitted by the undersigned being the attorneys of record of the Lehigh Valley R. R. Co. in the Court of Appeals and Supreme Court of the State of New York in the action within referred to.

March 11, 1914.

KENEFICK, COOKE, MITCHELL & BASS.

Buffalo, N. Y., March 11, 1914.

Witness:
EDWARD P. WHITE.

195 SUPREME COURT, STATE OF NEW YORK,
County of Ontario, ss:

I, James H. Tozer, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 189, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Leslie G. Loomis and Leslie G. Loomis, Jr., plaintiffs, against Lehigh Valley Railroad Company, defendant, and also of the opinions of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Canandaigua, N. Y., this 13 day of March, 1914.

[Seal of Supreme Court, Ontario County.]

JAMES H. TOZER,
Clerk of said Court in and for Ontario County,
By HOMER J. REED,
Deputy Clerk.

Endorsed on cover: File No. 24,119. New York Supreme Court. Term No. 106. Leslie G. Loomis and Leslie G. Loomis, Jr., plaintiffs in error, vs. Lehigh Valley Railroad Company. Filed March 20th, 1914. File No. 24,119.

6

Office Supreme Court, U. S.
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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR.,
Plaintiffs in Error,

vs.

LEHIGH VALLEY RAILROAD COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFFS IN ERROR.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

Page.
Statement of Case 1
Statement of Facts 4
Excerpt from Commission 5
Specification of Errors 9
Argument 10-30
Interstate Commerce Act, Section 1 11
I. The judgment under review presents a Federal question, because it is founded upon an erroneous construction of certain Federal statutes, and upon nothing else 14
II. It was the common law duty of the defendant to furnish the lumber in suit .. 15
III. The common law duty asserted by the plaintiffs is reaffirmed by Section 1 of the Interstate Commerce Act, the liability of the defendant is necessarily implied by Section 15, and the common law remedy is expressly saved by Section 22 20
IV. The common law duty asserted in this action was enforceable at the place of shipment by the courts of the State of New York, whatever the destination of the freight 26
V. The alleged defense is without foundation 28
VI. The judgment under review, so far as it reverses part of the original judgment, should itself be reversed, in other respects it should be affirmed, and the original judgment should in all things be affirmed, with costs in all the courts to the plaintiffs 30

II.

ALPHABETICAL LIST OF CASES CITED.

Page.
Atlantic Coast Line R. Co. v. Riverside Mills (219 U. S., 186, 31 Sup. Ct. Rep. 164) 13
Atlantic Coast Line R. R. Co. v. Mazursky (216 U. S., 122, 30 Sup. Ct. Rep. 378) 27
Cook v. Avery (147 U. S., 375, 384) 15
Chicago, M. &. St. P. Ry. Co. v. Solan (169 U. S., 133, 42 L. Ed. 688) 26
Cincinnati N. O. & T. P. Ry. Co. v. Fairbanks (90 Fed. Rep. 467, 471) 17
Commercial National Bank vs. Sloman (121 A. D., 874) 20
Eastern Railway Co. v. Littlefield (237 U. S., 140, 35 Sup. Ct. Rep. 489) 21
Farron v. Sherwood (17 N. Y., 227) 19
Galveston etc. R. Co. v. Wallace (223 U. S. 481, 32 Sup. Ct. Rep. 205) 13
Goodale v. Lawrence (88 N. Y., 513) 19
Hanks v. Missouri Pac. Ry. Co. (138 N. W. Reporter 750, 92 Neb. 594) 25
Hilton Lumber Co. v. A. C. L. R. R. Co. (6 L. R. A. (N. S.) 225, 229, 234) 17
Hutchinson on Carriers (Section 497) 16
Illinois Cent. R. R. v. McKendree (203 U. S., 514, 525) 15
Illinois Central R. R. Co. v. Mulberry Hill Coal Co. (238 U. S., 275, 35 Sup. Ct. Rep. 760) 21
Interstate Com. Com. v. Diffenbaugh (222 U. S., 42, 32 Sup. Ct. Rep. 22, at page 24) 21
L. &. N. R. R. Co. v. Brewing Co. (223 U. S. 70, 32 Sup. Ct. Rep., 189) 28
Loomis v. Lehigh Valley R. Co. (147 App. Div., 195, 132 N. Y. Supp. 138) 3
Missouri Pacific Ry. Co. v. Larabee Flour Mills Co. (211 U. S., 612, 29 Sup. Ct. Rep., 215) 28
Missouri Pac. Ry. Co. v. Castle (224 U. S., 541, 32 Sup. Ct. Rep., 606) 28
Murdock v. Memphis (20 Wall., 590) 15

Page.
N. Y., N. H. & Hartford R. R. vs. New York (165 U. S., 628) 28
Neass vs. Mercer (15 Barbour, 318, 321) 20
Norton vs. Coons (6 N. Y., 33, 40) 20
Nutt v. Knut (200 U. S., 12, 19) 15
Pearce v. Wabash R. Co. (192 U. S., 179) 15
Pennsylvania Railroad Company v. Puritan Coal Mining Company (237 U. S., 121, 35 Sup. Ct. Rep. 484) 21-22
Penn. R. R. Co. v. Knight (171 N. Y., 354, 192 U. S., 21) 28
R. R. Co. v. Davis (159 Ill., 53, 58) 17
Roberts vs. Ely (113 N. Y., 128, 131) 20
St. L., I. M. & So. Ry. Co. v. Taylor (210 U. S., 281) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR.,
Plaintiffs in Error,
vs.
LEHIGH VALLEY RAILROAD COMPANY,
Defendant in Error.
No. 106.

In Error to the Supreme Court of the State of New York.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF CASE.

This case comes here on a writ of error, issued March 5, 1914, to the Supreme Court of the State of New York, (Transcript, page 95), to review an order and judgment of said court (id. pp. 74-75) which made an order and judgment of the Court of Appeals of the State of New York entered in the Clerk's office of Ontario County, N. Y., May 12, 1913, the order and judgment of the Supreme Court of said State.

The decision of the Court of Appeals (id. p. 73) modified a judgment which the plaintiffs had recovered in the courts below, by reversing that part of the judgment which related to interstate shipments and by affirming the remainder which related to intrastate shipments, (Fol. 147). The action was brought to recover the cost of lumber furnished by the plaintiffs for the equipment of freight cars which the defendant supplied to the plaintiffs for the transportation of grain and produce. The lumber was used in building grain doors, bin doors and bulkheads, which were necessary for the proper loading of the cars.

This necessity will appear upon the inspection of a model showing the construction of the cars, which is in evidence and will be explained upon the oral argument.

The defendant's answer "denies, upon information and belief, each and every allegation in the complaint to the effect that it was the duty of the defendant to furnish cars equipped with grain doors, bin doors or bulkheads," (Transcript, Fol. 14).

The facts alleged by the plaintiffs were proved and found in their favor without dispute, (Fol. 162). The issue presented was really one of law.

In addition to the aforesaid denial of duty, the defendant alleged as a defense that it filed its tariffs under the Federal acts; "that the said tariffs named rates for transportation only, and did not provide for payments or allowances to be made for grain doors, bulkheads, or for the lumber used in making the same, placed in cars by shippers from the stations mentioned in the complaint," (Fol. 15). It also alleged a third defense which became immaterial by reason of failure of proof, (Fol. 16).

The Trial Court stated its position succinctly in denying the defendant's motion for a nonsuit, (Fols. 104-105).

The Appellate Division of the Supreme Court summed up the issue in a paragraph:

> "McLennan, P. J.: * * * The whole matter in controversy, as it seems to me, is extremely simple. The defendant, as required by the Interstate Commerce Commission, published a schedule of rates for the transportation of grain from points in this State to other points, some of them in foreign States. The plaintiffs in this case ordered cars to be furnished to them at certain points within this State, they agreeing to pay the schedule rate or tariff. The cars were furnished at a particular station; the plaintiffs were there with their grain to load it into such cars; they found that the cars were not suitable for carrying grain, but that by infinitesimal expense, to wit: by putting in grain doors or bulkheads and furnishing the lumber for the same, they could have their grain transported properly. They performed the duty which was imposed upon the defendant and which it undertook to perform, to wit: to furnish cars suitable for the transportation of grain. They did it at the least expense and in this action they only ask reimbursement. As we have seen, under such circumstances, they had a perfect cause of action at common law for the cost of doing what the other party, to wit: the railroad company, had agreed to do but failed, and, as before suggested, we think that there is no provision of the Interstate Commerce Act which prevents the recovery by the plaintiffs in the courts of this State of the actual amount of the expenditures made by them in the premises."

Loomis v. Lehigh Valley R. Co., 147 App. Div. 195, 132 N. Y. Supp. 138.

The Court of Appeals opinion is printed in the transcript, pp. 78-89. (See 208 N. Y. 312).

STATEMENT OF FACTS.

The plaintiffs are wholesale dealers in grain and produce, residing at Victor, N. Y., and ship large quantities of grain and produce in carload lots and in bulk over the defendant's railroad and other railroads at said station and many other stations in that section. They buy the grain and produce from farmers who draw it to the railroad stations for shipment. In order to handle such shipments the plaintiffs notify the defendant's agent at a certain station to furnish a car at a certain time to receive a carload of grain or produce, as the case may be. If a car is not provided there is no depot at these places to receive the load, but it must be taken away or the plaintiffs have to furnish storage. The senior plaintiff has been in this business for upwards of thirty years and during all that time it has been carried on as above stated, (Fols. 22-24).

In the early years the railroads "furnished a car for grain which was equipped with a grain door, which was fastened to the car and swung around into position and dropped down and fastened." Such cars are still used occasionally. Later the defendant and other railroads furnished lumber to the shipper without charge to build grain doors or bulkheads as he preferred, (Fols. 25-26).

From 1892 when the defendant extended its lines from Geneva to Buffalo, until 1904 or 1905 (Fol. 26), this was the uniform custom at all the defendant's stations. This was proved by half a dozen witnesses.

For instance, Fred T. Snook, for twenty years in the defendant's employ, testified that from January, 1892, when he went to Victor, N. Y., where the plaintiffs reside, until September 1, 1904, when he left there, the Lehigh Valley furnished lumber for grain doors and bulkheads, (Fol. 60).

> "The course of business with regard to furnishing that lumber was that the lumber was shipped in there in half carloads and carloads and piled up in the yard for shippers to use when they saw fit; and they used it from time to time in putting in bin boards and bulkheads in cars of produce shipped in bulk. That continued all the time I was there. I think that was still the custom when I left there in 1904. Before I went to Victor, at other points on the Lehigh Valley system, they furnished lumber for these purposes, and during my experience of twenty years and upwards that was the uniform custom of the Lehigh Valley," (Fol. 60).

Cumulative testimony on this point was given by Leslie G. Loomis, Fol. 26; Frank P. Jobes, Fols. 58-59; Joseph W. Tuttle, Fols. 71-72; James Hosey, Fols. 77-78; John G. Flanagan, Fols. 79-80, and John Quinn, Fol. 82. This evidence was entirely undisputed.

This custom has prevailed generally throughout the country since 1879; and freight rates have been fixed and maintained with respect to such custom. See 14 I. C. C. Rep. pp. 162-163. In this case the Commission said:

> "It is true that inside doors are furnished for shipments of grain in box cars, and that an allowance is made to shippers who furnish such doors; and this is said to be a discrimination against the shippers of lumber. *Furnishing inside car doors to shippers of grain is a custom that dates from about 1879, and the presumption is that rates are maintained with respect thereto.* The cost of the doors is practically the same in all cases, and special reasons induced railroads to

> furnish them. Grain and lumber are not competitive articles, and the fact that extra doors are provided for grain shipments is quite insufficient to establish a charge of undue discrimination against the shippers of lumber," pp. 162-163.

A "grain door" or "bin door" is an interior door or partition placed on the inside of the ordinary door of a freight car, and extending from the floor half the height of the doorway or thereabouts. Without such a "door" a car cannot be filled with grain, because with the outside door standing open to receive the grain, a large portion of it will run out on the ground. The same is true of produce in bulk such as apples, potatoes and the like. The arrangement ordinarily used is not a door but a partition made out of "bin boards," placed across the doorway one above another and fastened to the standards of the door. Hemlock boards are sawed into proper lengths and nailed inside as the loading progresses.

Bulkheads are similar partitions built crosswise of the car near the door frames, making a large bin of each end of the car and leaving the space between the car doors empty. These are practically equivalent to the grain doors, serving a similar purpose and requiring about the same amount of lumber or a trifle more.

The cars usually employed in carrying grain or produce are of two types, the box car with sliding doors, and the refrigerator car with folding doors which swing outward in two halves when opened. The plaintiffs have had a model prepared (Exhibit 1) which represents the sliding door on one side of the model car, and the folding door on the other side. The same necessity for grain doors and bulkheads exists in both cases.

The foregoing description is summarized from the testimony of Leslie G. Loomis, Sr., (pp. 15-17). The necessity for using grain doors and bulkheads is explained in his own language, as follows:

> "In loading a box car with grain, we have these bin boards that we put inside of the door and fasten up against the standards of the door on the inside of the car. As we fill the car higher and higher, we put one bin board above another and fasten it in place to the height that we think required so the loading will not slop out of the car. If we didn't use bin boards we couldn't fill the car to the minimum capacity demanded by the classification, taking a carload shipment. The railroads have a classification and prescribe the number of pounds to the carload. With our potatoes it is 30,000 pounds as the minimum. The minimum on grain is 60,000; at the time of the commencement of this action it was 40,000 pounds. We have to pay the rate on 40,000 pounds no matter whether we had only 20,000, if it was shipped in bulk. If we had to pay for 40,000 pounds we couldn't get that amount in without the bin boards. If we put part of the load into the car, putting what we get in either end of the car and closed the car door, in transit the grain would seek its level, in the movement of the train, as the car moved ahead or backed, and it would come against the outside door and press against the door until it would leak continually around the door, or it might press the door clear out. It is only a thin door, one thickness of lumber, usually. The loading would fall on the ground, and part of that load would be lost before it reached destination. When we got to destination with the car and started to open the door, the grain would run out on the ground. We might take a bar and push it open, but the pressure would be so great it would be hard to open. That portion of the grain lying against the door would run

> on the ground. In order to prevent that occurring, we put the bin boards as I have described. * * * * * If we attempted to load grain in a produce car or refrigerator car, putting in either end of the car as much as we could and then closed the door, the same thing would happen in transit as I have described with reference to the box car. When we opened the refrigerator doors the grain would all run out; the grain would push against it so it would come out of the whole opening. On the other side (of model, Exhibit 1) it would only open to the amount you opened the car.
>
> "Taking up the subject of produce: If we tried to load an ordinary box car with produce without using bin boards or the bulkhead and put in either end what we could conveniently and close the door, practically the same would happen as in the case of the loading of grain. If we had potatoes or cabbages, they would come to the center of the car and seek a level. In that process of jolting back and forth the produce or potatoes would be jammed around and injured and would come against the side of the car and when the car was opened they would run out in the same manner." (Fols. 28-31).

To the same effect is the testimony of Frank A. Ely, (Fols. 85-87), and of Francis G. Farrell, president of the New York State Shippers Protective Association, (Fols. 98-99).

After the defendant refused to furnish lumber for grain doors and bulkheads, the plaintiffs furnished it themselves. The present firm of L. G. Loomis & Son was organized in 1906. They notified certain of the defendant's agents that unless the company furnished a car suitably equipped, they would equip it themselves and furnish a bill to the company for reimbursement, (Fol. 28). Thereafter they kept an account, which is set forth in Schedule A annexed to the complaint, giving in each instance the date of shipment, car number, place shipped from, place shipped to, contents, number of feet of lumber used, cost per thousand feet and value of amount furnished. (See Transcript of Record, opposite page 6). From time to time claims were presented to the defendant covering three sections of this account. Letters passed between the parties relating thereto, (Exhibits 3-10, pp. 59-62). The claims were finally rejected upon the sole ground "that inasmuch as we have no Tariff I. C. C. authority covering this expense, we cannot legally pay claims of this nature," (Fol. 123).

Upon the trial every item of this account was proved to a cent. The proof is omitted from the printed record by stipulation of the parties, (Fol. 117).

There is no evidence whatever that the defendant was ready or willing to supply a single board at any of the times or places in question. The proof shows repeated demands and refusals at various stations (Fols. 27, 63, 72, 75, 92, 97), and that at all of the other stations where the plaintiffs supplied lumber, the defendant had previously discontinued furnishing it, (Fols. 59, 77, 79, 93-94).

The items of the account extend from August 29, 1906, to May 6, 1908. They number 201 and amount to $322.07. The average cost per car is a fraction more than $1.60.

SPECIFICATION OF ERRORS.

The assignments of error are found on pages 90-92 of the printed record. The conspicuous error lies in the holding of the Court of Appeals that there was a defense under the Interstate Commerce Act, whereas that Act positively affirms the cause of action.

This error was double, in holding:

> (1) "That the general subject (of collecting the damages in suit) is one of which the Congress of the United States has assumed control. * * * * Congress has not only acted in the premises but it has prescribed in terms which indicate an intention to exclude all others, the tribunals to which the claimant must address himself. * * * * Under the Federal statute, the question is not whether the Interstate Commission has acted, but whether Congress has assumed such control of this feature of interstate commerce as to divest our state courts of the jurisdiction which they had before the Federal statutes were enacted," (Fols. 173-174).
>
> (2) "Neither would it be profitable to dwell at length upon the difference contended for by plaintiffs' counsel, between a question of rates and a carrier's common-law duty, to furnish cars suitable for the traffic in which he engages. Conceding its existence and admitting the abstract soundness of the argument, the fact remains that Congress has made it a question of rates over which the Interstate Commerce Commission has exclusive control, and in respect to which any justiciable controversy is referred exclusively to the Federal Courts," (Fol. 176).

In reaching these conclusions the learned court misread the statutes which it cited, particularly Sections 1, 6 and 9 of the Interstate Commerce Act, and entirely disregarded the provisions of Sections 15 and 22 which were urged upon its attention.

ARGUMENT.

The plaintiffs brought their action upon the common law duty of the defendant as a common carrier to furnish cars suitably equipped for the shipment of grain and other produce in bulk. They proved a breach of this duty by the defendant, and recovered as damages merely the actual cost at the market price of the lumber which they had necessarily supplied for the purpose.

The Interstate Commerce Act, Section 1, distinctly declared and re-enacted this common law duty by providing as follows:

> "And the term 'transportation' shall include cars and other vehicles and *all instrumentalities and facilities of shipment or carriage,* irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and *it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor,* and to establish through routes and just and reasonable rates applicable thereto."

Section 15 of the Act, by imperative implication, held the carrier liable for the lumber furnished by the plaintiffs as part of the "transportation" above defined. The third paragraph of this section, as amended June 29, 1906, and in effect at the time of the transactions in suit, read as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished,

> and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

By the Act of June 18, 1910, the words "or on its own initiative" were inserted after the words "after hearing on a complaint."

Section 22 contained this further provision:

> "And nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

Under the foregoing provisions the plaintiffs' cause of action and remedy were clear. The regular rates published in the defendant's tariffs called for and paid for full "transportation," including the lumber which the plaintiffs were obliged to buy and supply on the defendant's account. The defendant not only denied its duty to furnish such lumber, but equivocated as to the custom that had previously prevailed, alleging "that it is the custom now, and has been for many years, for shippers of freight in carloads to load and unload their own freight, without the intervention of employes of the carrier, and to secure their freight in cars in such manner as seems best to them, and if additional appliances of any kind seem necessary to them, such appliances are furnished and paid for by the shippers loading and unloading such cars," (Fol. 16). But the clear and uncontroverted proof showed that it had been the custom for many years for the defendant to furnish lumber gratuitously for the purpose stated, (see Statement of Facts above).

The Court of Appeals while sustaining the judgment as to all items of intrastate shipment, argued that the state courts had no jurisdiction as to interstate items because of the provisions contained in Section 6, paragraphs 1 and 7, and Section 9, of the Commerce Act, and Section 1, paragraphs 1 and 2, of the Elkins Act, (Fols. 164-166).

The plaintiffs urge that inasmuch as the regular rate covered entire "transportation," including the necessary lumber, there was no need to publish in the tariffs any special rule or regulation in respect thereto, that the omission of any such special rule or regulation from the tariff did not relieve the carrier from furnishing full "transportation," and that the prohibitions and penalties cited had no application to the case. The furnishing of lumber by the defendant according to its previous custom would have been a complete compliance with the terms of its tariffs and the provisions of law. The provisions of the Commerce Act, Section 9, cited by the court, had no relation to damages arising from a breach of the defendant's common law duty, because Section 9, when read in connection with the preceding section, was limited to cases of "damages sustained in consequence of any violation of the provisions of this Act," and the damages in this suit were not so sustained, but were declared by the common law many years before this Act was enacted.

> Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. Rep. 164.
>
> Galveston etc. R. Co. v. Wallace, 223 U. S. 481, 32 Sup. Ct. Rep. 205.

The court's conclusion that Congess had given the plaintiffs a choice between the Interstate Commerce Commission and the Federal Courts, and thereby excluded them from the state courts was,therefore, without foundation.

The plaintiffs assert further that the recovery of the damages in suit has no relation to any question of tariff rates, that the cases relating to rates which the Court of Appeals cited, have no application to the case at bar, that there is nothing in this case "calling for the exercise of the administrative power and discretion of the Interstate Commerce Commission," and that the recent decision of this court in the Puritan Coal Mining Co. case that the common law remedy remains, is controlling. These positions will be stated more fully in the following points.

POINTS.

I.

The judgment under review presents a Federal question, because it is founded upon an erroneous construction of certain Federal statutes, and upon nothing else.

Reference to the Court of Appeals decision (pp. 78-79), shows that it is expressly based upon the learned court's construction of certain provisions of the Interstate Commerce Act and the Elkins Act of February 19, 1903, therein quoted, and upon nothing else. The plaintiffs have thereby been deprived of the benefit of the judgment in their favor, which has in part been reversed. The Federal Acts mentioned were distinctly pleaded in the defendant's answer (Fols. 14-16), and have furnished the sole issue which has been disputed in the several successive courts, (Fols. 103-105, 114, 136-137, 146-147, 178).

Judicial Code, Act March 3, 1911, c. 231, section 237, re-enacting without change Section 709 R. S.

Nutt v. Knut, 200 U. S. 12, 19.
Illinois Cent. R. R. v. McKendree, 203 U. S. 514, 525.
Pearce v. Wabash R. Co., 192 U. S. 179.
Cook v. Avery, 147 U. S. 375, 384.
St. L., I. M. & So. Ry. Co. v. Taylor, 210 U. S. 281.
Murdock v. Memphis, 20 Wall. 590.

II.

It was the common law duty of the defendant to furnish the lumber in suit.

It was part of the defendant's business as a common carrier to receive, transport and deliver grain and produce in carload lots in bulk, (Fol. 199). It was its duty to furnish fit and suitable cars for that purpose. The cars furnished were unfit and unsuitable. They would not carry the goods safely. The side doors, without reinforcement, would be pressed out and the grain and produce would dribble along the railroad. When the doors were opened at destination the goods would run out on the ground. The cars as furnished by the defendant would not carry a full load. The plaintiffs had to pay the rate on 40,000 pounds of grain, as a minimum carload, no matter if the car held only 20,000 pounds. The plaintiffs could not get 40,000 pounds in a car without the bin-boards, (Fol. 29).

The defendant defaulted in its duty, and the plaintiffs supplied the default as they had a right to do, and were bound to do in order to make the defendant's damages as small as possible. They thereby prevented the damage to the goods that would have ensued from nonshipment and saved the goods from loss occurring in transit and in unloading. The boards were furnished for the protection of the defendant and not for the advantage of the plaintiffs. The latter secured nothing except what the defendant was under obligation to furnish without charge.

The rate which the plaintiffs paid the defendant was the full rate for transportation in cars duly equipped. These rates continued the same after the defendant stopped furnishing the bin boards as they had been before, (Fols. 27, 89).

The refusal of the defendant, therefore, to furnish the necessary lumber was an arbitrary and unjustifiable exaction of the value thereof from the pockets of the plaintiffs.

Whether the lumber was used to board up the doorways or to build bulkheads across the car is immaterial. In one form or the other the lumber was absolutely necessary, the amount required was practically the same in either case, and the defendant retained all of the lumber used.

The duty of a common carrier is stated in Hutchinson on Carriers, Section 497, as follows:

> "*Must provide safe and suitable vehicles.* And not only must he provide himself with means sufficient to transact business for which he has advertised and held himself out to the public as soliciting, but he must provide himself with means of transportation *safe* and *suitable* for his business in which he engages. *No defect in any vehicles or in any instrument used in the transportation of goods,* can excuse the common carrier from his common law liability to be answerable for the safety of the goods at all events, except when the loss may occur from the act of God or of the public enemy. * * * If he be a carrier by water he must provide himself with a vessel tight and staunch and provided with all tackle

> and apparel of every kind which may be in use by those skilled in the business and which may promote the safety of the voyage. * * * * So if he be a carrier by land it is clearly his duty to furnish vehicles which are safe and sufficient for the purpose intended."

In a case in which Mr. Justice Lurton wrote the opinion and Judge William H. Taft concurred, it is said:

> "Nor is it to be conceded that the carrier should avoid responsibility as a carrier by devolving upon the shipper the duty of inspecting or selecting the cars in which his goods are to be shipped. *The duty of the carrier is to furnish fit and suitable cars* for the carriage of goods."

Cincinnati, N. O. & T. P. Ry. Co. v. Fairbanks, 90 Fed. Rep. 467, 471.

See also, Hilton Lumber Co. v. A. C. L. R. R. Co., 6 L. R. A. (N. S.) 225, 229,234.

R. R. Co. v. Davis, 159 Ill. 53, 58.

The Public Service Commission, Second District, of New York, decided the question in this case after a full investigation, to which both the plaintiffs and the defendant in this action were parties.

The Matter of the Complaint of the New York State Shippers Protective Association, Incorporated, against the N. Y. C. & H. R. R. R. Co., the D. L. & W. R. R. Co., Erie R. R. Co., B. R. & P. Ry. Co., Lehigh Valley R. R. Co. and the Pennsylvania R. R. Co., came before the Commission in 1907, and continued until November, 1909, when it was decided in an able opinion by Commissioner Decker. It is published in an official pamphlet, which is submitted herewith, and is reported in the Public Service Commission Reports, Second District of New York, Volume 2, page 251.

The Commission said:

> "The duty of the carrier to transport safely whatever traffic it holds itself out to carry is fully recognized at common law, and obviously includes the provision of suitable cars and other facilities or instrumentalities involved in that service. This obligation at common law is specifically declared in the Public Service Commissions Law."

Sections 26, 37, 38 and 49 are thereupon quoted, and the opinion continues:

> "These references to provisions of the regulating statute are in themselves sufficient to fully indicate the intent of the Legislature to require from carriers strict compliance with the rule for safe carriage, including provision of cars in all respects suitable for the transportation of freight of every kind and nature which they undertake to carry," (Id. pp. 260-261).

"Inside doors or bulkheads for bulk produce shipments" are considered at page 265, and the following conclusion is reached:

> "In our opinion, the legal duty of the carrier to furnish a suitable car for the transportation of either grain, potatoes or other bulk produce, includes provision of a proper inside guard for the carload. This duty of carriers is recognized in practice by the respondents (including Lehigh Valley R. R. Co.) and by railroad carriers generally in respect of grain. It is recognized in practice to an extent by some of the respondents as to other bulk freight," etc., (p. 267). * * * * *
>
> "We hold further that the carrier's obligation to furnish a suitable car extends to the provision thereof without requiring any intervention whatsoever on the part of the shipper or contribution by the shipper in money, material, or time," (p. 273).

The conclusion upon this part of the proceeding was: "That order should be entered requiring the respondents to furnish cars for these bulk shipments so equipped with inside or grain doors, bulkheads, or other proper device that loading and unloading may be accomplished with reasonable facility," (p. 274).

Thereupon the defendant issued a supplement to its tariff providing for furnishing lumber for temporary doors or bulkheads when available at shipping point, and when furnished by shippers making an allowance not to exceed $2 per car. This amendment was made to the interstate tariff as well as the intrastate tariff, Exhibits 25 and 26, (Fols. 130, 132). Since then the defendant has furnished lumber without charge accordingly.

The defendant had previously, without charge, furnished lumber for grain doors at Buffalo, East Buffalo, North Tonawanda, Niagara Falls and Suspension Bridge, and made a similar allowance of $2 per car to shippers when they furnished the lumber. (See Exhibit 22, dated June 21, 1907, and Exhibit 23, dated February 14, 1908, Fols. 124, 129).

The reimbursement which the plaintiffs seek in this action for lumber furnished at noncompeting points is the same as the defendant was voluntarily paying at competing points.

An action will lie at common law in favor of the plaintiffs against the defendant for the moneys so paid, laid out and expended by the plaintiffs for the defendant.

Goodale against Lawrence, 88 N. Y. 513.
Farron against Sherwood, 17 N. Y. 227.

In none of these cases is it necessary for the plaintiff to show an *express* agreement on the part of the defendant to reimburse because the law implies the promise to pay from the necessity of the act and the rendition of the service. While the action is one at law yet the essence of it is in equity. It is in its nature equitable and is founded upon the principle of fair play—that is no man should be compelled to pay another man's debts.

> Commercial National Bank vs. Sloman, 121 A. D. 874.
>
> Roberts vs. Ely, 113 N. Y. 128, 131.
>
> Neass vs. Mercer, 15 Barbour, 318, 321.
>
> Norton vs. Coons, 6 N. Y. 33, 40.

The decisions of the state commission and state courts upon these questions will, of course, be accepted by this court.

III.

The common law duty asserted by the plaintiffs is re-affirmed by Section 1 of the Interstate Commerce Act, the liability of the defendant is necessarily implied by Section 15, and the common law remedy is expressly saved by Section 22.

The provisions of Sections 1, 15 and 22, covering these points, have been quoted above (pp. 10-12).

(a) The lumber in suit was part of the "instrumentalities and facilities of shipment or carriage," which section 1 required the defendant to furnish.

(b) Of Section 15, this court has said:

> "The Act of Congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter he shall pay for them. That is taken for granted in §15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum

in case there is complaint, (or now upon its own motion, Act of June 18, 1910)."

Interstate Com. Com. v. Diffenbaugh, 222 U. S. 42, 32 Sup. Ct. Rep. 22, at page 24.

This action was begun August 18, 1909, (Transcript, p. 1), prior to the amendment above noted even if that amendment were material, which it seems not to be.

This provision (Section 15, paragraph 8) is negative in form and was evidently drafted with the intention of excluding any matter not therein expressed. It begins:

> "*If* the owner of property * * * renders any service * * * the charge (by the owner) and allowance (by the carrier) therefor shall be *no more than* is just and reasonable," etc.

This includes only the case of an agreed settlement —a voluntary arrangement—between shipper and carrier, and provides against the amount agreed upon being too large—*not* too small. In the present case ~~there~~ there has been no "charge and allowance," but the charge has been disallowed, and an allegation is impossible that such charge and allowance are "more than is just and reasonable." The provision is directed only against excess, and in the absence of any allegation or proof of excess, no power or duty of the Commission was called into existence.

(c) The effect of the provision above quoted from Section 22 has been settled by the decision of this court in Pennsylvania Railroad Company v. Puritan Coal Mining Company, 237 U. S. 121, 35 Sup. Ct. Reporter 484, followed and reaffirmed in Eastern Railway Co. v. Littlefield, 237 U. S. 140, 35 Sup. Ct. Rep. 489, and Illinois Central R. R. Co. v. Mulberry Hill Coal Co. 238 U. S. 275, 35 Sup. Ct. Rep. 760.

It was there held that State Courts have jurisdiction concurrent with the Federal Courts by reason of the provision above quoted, of a suit by a shipper against an interstate carrier to recover the damages arising in interstate commerce out of the latter's failure to discharge its common law duty to furnish the cars needed by the shipper.

It is submitted that no substantial distinction can be made between the cases cited and this case. The carrier's failure to supply a car at all, and to supply a fit and suitable car fall in the same category, and the damages arising in both cases are recoverable at common law in the State Courts. In one case the failure extends to the whole car, in the other case to an essential part of a car.

> "The decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission, or relate to a subject as to which the jurisdiction of the Federal Courts had otherwise been made exclusive," (Puritan case, 237 U. S. at page , 35 S. C. Rep. at page 487).

The plaintiffs had conceded the reasonableness of the defendant's rates and paid them. The only issue was whether the defendant had failed in the performance of its duty. Of this issue the State Court had jurisdiction. The judgment affirms this as to interstate shipments, but as to interstate shipments the Court of Appeals confused the issue with "a question of rates over which the Interstate Commerce Commission has exclusive control," (Transcript, p. 88).

The defendant's rates continued the same after it quit furnishing lumber as they had been before, (Fols. 27, 45). The cost of the lumber furnished bore no relation to the rate of freight. It was the same for a car traveling 100 miles as for one traveling 1000 miles, the same for a car carrying a load of 10,000 pounds as for one carrying 20,000 or 30,000 pounds, the same for wheat as for rye or oats, the same for apples as for potatoes or cabbage.

The regular published rates included the cost of the necessary lumber. It could not be added to or subtracted from the rates. They were unaffected by it. The cause of action had nothing to do with a question of rates.

The case in principle is the same as if the defendant had tendered a car with one of its doors torn off. The plaintiffs, if obliged to use the car, could replace the missing door and recover the cost, no matter whether its destination were within the state or not, and without regard to the rate of freight.

The issue in this case was as to the defendant's duty to furnish a suitable car "without requiring any intervention whatsoever on the part of the shipper or contribution by the shipper in money, material or time," as the Public Service Commission defined it, (2 P. S. C. Rep., Second Dist. N. Y., p. 273).

The defendant squarely joined this issue, (Fols. 13-14) but it also slipped in an immaterial issue under its second defense that its "said tariffs named rates for transportation only and did not provide for payments or allowances to be made for grain doors, bulkheads, or for the lumber used in making the same, placed in cars by shippers from the stations mentioned in the complaint," (Fol. 15).

This related to a derivative duty which arose only after the original duty was conceded and performed. It applied to a case where the carrier agreed with the shipper to commute the specific performance for a substituted performance, and pay the shipper for doing what the law required the carrier to do. Some carriers had seen fit to bargain with the shippers to allow them a certain amount per door if they would supply the grain doors themselves. But in the present case there was nothing of the kind, the defendant was absolutely denying its duty and refusing to pay the plaintiffs a cent for their lumber.

The defendant having failed and refused to supply the lumber could not make a defense for itself by further failing to insert in its tariffs a provision to allow a certain sum therefor fixed by the carrier. But this is the defense which misled the Court of Appeals.

If the defendant had specified an allowance in its tariffs, the plaintiffs could have recovered the same in the State Courts, whether the cars were engaged in interstate commerce or not, but no such thing having been done the plaintiffs clearly could recover the actual cost of the lumber in the State Courts.

Proof that the defendant was simply perpetrating an illegal exaction is found in the fact that while it was absolutely denying its duty to the plaintiffs, it was furnishing grain doors at Buffalo, East Buffalo, North Tonawanda, Niagara Falls and Suspension Bridge, N. Y., and when the same were supplied by shippers, the defendant made an allowance not to exceed Two Dollars ($2.00) per car. (See Tariff Circulars dated June 21, 1907, and February 14, 1908, Exhibits 22 and 23, Transcript, pp. 62-63).

In its motion for a nonsuit the defendant urged "that the propriety of the defendant making any reparation in any amount for grain doors on interstate shipments has been ruled upon and order issued pursuant to the Interstate Commerce Act by the Interstate Commerce Commission in its bulletin, No. 4, paragraph 78, under date of June 1, 1908," (Fol. 103). This bulletin does not appear in evidence, and it will be noted that it does not purport to have been issued until after the last item of plaintiffs' claim had been furnished, which was on May 6, 1908, (Schedule A, p. 11 c). The paragraph in question read as follows:

> "78. Grain Doors. A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariffs."

This ruling was entirely immaterial to the issue involved in this action, as to the defendant's primary duty to furnish a fit and suitable car, and related only to making reimbursements in case the duty was conceded. Certainly it could not be retroactive, as was decided by the Supreme Court of Nebraska in 1912.

> Hanks v. Missouri Pac. Ry. Co., 138 N. W. Reporter 750, 92 Neb. 594.

The case cited is substantially identical in its facts with the case at bar, and is an authority for the plaintiffs from the highest court of the State of Nebraska, which has never been questioned.

The primary duty of the carrier to furnish a car fit and suitable for the transportation of grain and produce in bulk or to pay the shipper the actual cost of remedying the carrier's breach of duty, being enforceable at common law, is independent of the "exercise of the administrative power and discretion of the Interstate Commerce Commission." After this common law duty has been conceded and provided for, the carrier may bargain with the shipper to pay him for performing it himself, and such bargainings, where there is any question or suspicion as to their reasonableness, may come within the control of the Commission, but the primary common law duty remains unaffected. As to that, the Commission has no administrative power or discretion, the duty being affirmed and declared by the statute, as shown above.

The Federal statutes affirm the cause of action which the court below reversed.

There is no claim that this action "related to a subject as to which the jurisdiction of the Federal Courts had otherwise been made exclusive," (35 Sup. Ct. Rep. 487). Therefore, under the authority of the Puritan case, the State Court had jurisdiction.

IV.

The common law duty asserted in this action was enforceable at the place of shipment by the courts of the State of New York, whatever the destination of the freight.

This follows from the authorities above cited and from the authorities cited below. See Judge Gray's brief dissenting opinion, (Transcript. Fol. 179).

The breach of the defendant's duty occurred when it tendered a car unfit and unsuitable for the purpose required. The cause of action was complete when the plaintiffs necessarily supplied the lumber. If the State Court had jurisdiction in any of these cases, as has been held, it had in all. This is true unless there is some statutory prohibition in respect to interstate commerce, and no such prohibition exists.

In Chicago, M. & St. P. Ry. Co. vs. Solan, 169 U. S. 133, 42 L. ed. 688, the court said:

> "Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a State, are subject to its law. It is in the law of the State that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from

> their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a State, to the protection of that State, as those who travel on domestic trains. A carrier exercising his calling within a particular State, although engaged in the business of interstate commerce, is answerable, *according to the law of the State, for acts of nonfeasance* or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law.''

Recently the U. S. Supreme Court has affirmed the judgment of a South Carolina Court, holding that a statute penalizing the failure of a common carrier to adjust and pay within a specified time claims for loss or damage does not unlawfully interfere with interstate commerce, *even as applied to shipments from without the State,* where the statute is construed by the State Courts as affecting only the liability of carriers doing business in the state, for property lost or damaged while in their possession.

Atlantic Coast Line R. R. Co. vs. Mazursky,
216 U. S. 122, 30 Sup. Ct. Rep. 378.

The individual states have always had jurisdiction and have always exercised powers relating and pertaining incidentally to interstate shipments and interstate commerce.

Penn. R. R. Co. vs. Knight, 171 N. Y. 354, 192 U. S. 21.

N. Y., N. H. & Hartford R. R. vs. New York, 165 U. S. 628.

Missouri Pacific Ry. Co. vs. Larabee Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. Rep. 215.

In the case last cited, the mandamus of a State Court was sustained, compelling a carrier to resume the transfer and return of cars loaded and unloaded at the applicant's elevator, although three-fifths of the business was interstate. The opinion contains a collection of cases in which State Laws incidentally affecting interstate commerce have been sustained.

Other cases on this point have since been decided by this court.

L. &. N. R. R. Co. v. Brewing Co., 223 U. S. 70, 32 Sup. Ct. Rep. 189.

Missouri Pac. Ry. Co. v. Castle, 224 U. S. 541, 32 Sup. Ct. Rep. 606.

V.

The alleged defense is without foundation.

It rests on a misconstruction of Section 6 of the Interstate Commerce Act. It assumes that this section required the defendant to print in its tariff schedules some rule or regulation as to furnishing lumber for grain doors and binboards, and that it forbid the defendant from paying the plaintiffs' claim because no such rule or regulation was contained in the schedules. Both of these assumptions are mistaken.

The furnishing of a fit and suitable car was all that the plaintiffs required. No special privilege or facility was requested or expected. Any rule or regulation which the defendant could lawfully promulgate would not "in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." The rate regularly printed covered the entire transaction. This follows from the verdict that has been found upon undisputed evidence.

The second assumption is equally mistaken. The defendant is not forbidden by the statute to pay just compensation for a breach of its duty as a common carrier. This is not to "refund or remit in any manner or by any device any portion of the rates, fares and charges so specified." This prohibition relates to an illegal rebate not to an act of justice. The pretended defense is a perversion of the purpose of the statute.

The cases cited by the defendant as to its common law duty, relate to other matters than its duty to furnish grain doors and bulkheads, such as icing shipments, unloading cattle, furnishing false bottoms and car linings, and stakes for hay and lumber cars. These cases are not in point.

The defendant cites cases to prove that where interstate commerce is affected the State Courts are without jurisdiction.

These cases relate to special matters, namely, demurrage for detention of cars, hours of labor of employes, failure to transport freight immediately, employers' liability, safety appliances, actions to recover for excessive or unreasonable rates, mileage tickets, optional charges for loading or unloading freight, expedited service, special contracts for rates, special agreement for annual pass in release of claim for personal injuries, and bonus to packers for building packing house near Chicago stockyards. These actions relate either to special services or special facilities to be furnished by the carrier, or to the reasonableness of rates, or to matters directly affecting rates. They show that the Federal Courts are insisting that the uniformity of the Interstate Commerce system shall be maintained, and are condemning any practice that will lead to undue discrimination.

The distinction between these cases and the present case is that which Chief Justice White points out in the Abilene Cotton Oil Company case, 204 U. S. 426, 27 Sup. Ct. Rep. 350, at page 357:

> "In other words, the difference between the two is that which, on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing of that equality which the statute commands."

VI.

The judgment under review, so far as it reverses part of the original judgment, should itself be reversed, in other respects it should be affirmed, and the original judgment should in all things be affirmed, with costs in all the courts to the plaintiffs.

Dated, November 17, 1915.

EDWARD P. WHITE,
Attorney for Plaintiffs-in-Error,
921 Marine Bank Building,
Buffalo, N. Y.

Edward P. White,
John Colmey,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR.,
Plaintiffs in Error,
vs. No. 106
LEHIGH VALLEY RAILROAD COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

REPLY BRIEF FOR PLAINTIFFS IN ERROR

The defendant-in-error says in its brief at page 9:

"No claim was made in the complaint nor advanced upon the trial, nor made in any court until this appeal, that the right of plaintiffs-in-error to recover existed by virtue of Sections 1, 15 and 22 of the Interstate Commerce Act as giving an additional remedy to the remedies prescribed in the Interstate Commerce Act itself, nor was any claim made by virtue of any other provision of the Interstate Commerce Act."

And at page 11:

"At no place in the transcript of record filed in this court prior to the said judgment of the Court

> of Appeals, has any claim for any title, right, privilege or immunity under any statute of the United States been specially set up or claimed.
>
> "For the first time the plaintiffs-in-error set up such a claim in their petition for a writ of error, prepared nearly a year after the decision of the Court of Appeals (fols. 155-158).
>
> "It is the defendant-in-error that has specially set up and claimed privileges and immunities under the Interstate Commerce Act. The claim of the plaintiffs-in-error has been based upon the common law."

These remarks may be immaterial, but nevertheless are misleading. Substantially the same questions were presented to the Court of Appeals as are presented to this Court. At pages 22-23 of the plaintiffs' brief, section 15 of the Interstate Commerce Commission Act is set forth in full, and at page 32 is printed the proviso from section 22 of the same Act. The opinion of Judge Werner says (Transcript, p. 88):

> "Neither would it be profitable to dwell at length upon the difference, contended for by plaintiff's counsel, between a question of rates and a carrier's common-law duty to furnish cars suitable for the traffic in which he engages. Conceding its existence and admitting the abstract soundness of the argument, the fact remains that Congress has made it a question of rate over which the Interstate Commerce Commission has exclusive control, and in respect of which any justiciable controversy is referred exclusively to the Federal Courts."

This sufficiently recognizes the issue presented, although the Court omitted to discuss the provisions or authorities cited. The plaintiffs have opposed the defendant's contention at every step of the way, and the record so shows.

The ruling of the trial court upon the defendant's motion for a non-suit, based upon provisions of the Interstate Commerce Act, was as follows (Transcript, p. 52):

> "The Court: Said motion is denied, in each branch, and exception allowed as to each branch, with permission to complete any incomplete statements if you desire.
>
> "I assume it to be true that the rates paid were the regular rates, and that the railroad carrier did all that the acts of Congress and the State Legislature required as to rates, and that freight was paid at such schedule rates. I assume that it is also true that service measures rates. To that extent, and to that only, are the rates involved in this case. It is equally true that, independent of any statute, there are common law obligations incurred by a carrier, and that an action for insufficient or inefficient service is not an action involving a question of rates, but a common law action whereby a shipper seeks to enforce a liability for non-compliance with the duty required. This is an action for damages for a breach of an implied contract to furnish sufficient and efficient cars for transportation. A commodity in bulk was offered and accepted, and it became the duty of the carrier to furnish means reasonably sufficient to get it to its destination without unnecessary leakage, deterioration or waste. If he did not do that, it was a breach of contract, and as a measure of damages the shipper asks and is entitled to his actual expense in making the cars usable after request and refusal. Where a duty is imposed upon another, after default, a person damaged may perform and charge the expense to the other party, under the implied contract that he will repay.
>
> "I think the action holds on both these grounds. We have no jurisdiction over rates, and have nothing to do with them here.
>
> "Mr. Bass excepted."

The opinion of the Appellate Division of the Supreme Court affirming the position of the trial court is reported in 147 App. Div., 195; 132 N. Y. Supplement, 138, and is quoted in part on page 3 of the principal brief of the plaintiffs-in-error.

The record demonstrates that the plaintiffs asserted and claimed their rights under the Federal statutes at every turn.

The defendant recognizes its own right to review the Federal question presented in the highest court of the State, provided the decision had been adverse to it, but cannot see the correlative right of the plaintiffs to the same measure of justice. An erroneous construction of a Federal statute is a decision against the true validity of its provisions. It is as important to the United States to stop the circulation of a counterfeit presentment of one of its great statutes as to stop the circulation of counterfeit money. This court has asserted its jurisdiction in such cases from the earliest time.

II.

The contention of the defendant-in-error that it refused to furnish "grain doors" or "bin-boards" to the plaintiffs in obedience to the Hepburn Act is inconsistent with its denial in the pleadings and upon the trial of such refusal (fols. 7, 8, 13, 14), and with the strenuous denial of its liability for the intra-state items, as to which the Hepburn Act had no application.

In fact the Hepburn Act made no difference in the law relating to this case. The original act of February 4, 1887, section 1, provides that "the term 'transportation' shall include all instrumentalities of shipment or carriage." This included grain-doors and bin-boards as clearly as the amended section did. The material part of the amendment of section 6 is found in the third sentence: "The schedules * * * shall also state separately * * * all privileges or facilities granted or allowed." But lumber for grain-doors was not a privilege or facility granted or allowed. It was a necessity refused.

The so-called admission which the defendant tries to wring from the statement that "lumber in suit was part of the 'instrumentalities and facilities of shipment or carriage' which Section 1 required the defendant to furnish" (Brief for Plaintiffs-in-Error, p. 20) is directly contradicted by the assertions appearing throughout the same brief that the "grain-door" or "bin-door" was an indispensable part of the car (p. 6, 2), that "the lumber was absolutely necessary," (p. 16), etc. These were assertions of undeniable fact. The defendant-in-error would confuse the terms instrumentalities, facilities and privileges, which occur in different sections, and treat them as interchangeable. This is misleading.

Inasmuch as lumber for grain-doors is not a "privilege or facility," but an integral part of a fit and suitable car for transporting grain and produce, there was no need to specify it in any schedule, and it did not come within the prohibition which the defendant-in-error so much dreads, forbidding it to "extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs," (Section 6, near the end). In this connection the word facility must be treated as similar to privilege. In forbidding rebates Congress did not intend to deprive a shipper of his common-law rights.

The defendant has failed to attack the elementary propositions of the plaintiffs' case, to wit: the facts found by the verdict and the common-law duty of the defendant, but it seeks to circumvent the common-law duty by asserting that the Hepburn Act abrogated it by implication. The sections above analyzed raise no such implication, and the Act itself contains the express proviso in Section 22, which has been quoted. But the defendant-in-error reasons (Brief, p. 30), that in saving the existing remedies at common-law, Congress did not intend to save the common-law rights of action to which such remedies attached. Such reasoning has been dealt a final blow by the decision in the Puritan case and other cases following it.

III.

The defendant-in-error has heretofore taken the position that "the question here involved" "is a question of rates" (motion for non-suit, fol. 102), but it has so far retreated from that position as now to claim "that an allowance for grain-doors or bin-doors necessarily would affect the interstate rates of defendant-in-error, and the privileges or facilities furnished in connection therewith," (Brief, p. 9). This is not the proposition in issue. There has never been "an allowance" in the case and the plaintiffs have made no claim on account thereof. The plaintiffs complain of a breach of duty, in that the defendants failed to furnish the transportation for which it collected its regular tariff rate. The publishing or not publishing of "an allowance" in the schedules has nothing to do with the issue.

The plaintiffs do not complain of any tariff filed by the defendant. They complain that the defendant did not live up to its tariff. They did not allege discrimination and had no need to prove it. The common-law remedy was sufficient, without adopting any other remedy which the defendant has suggested it might prefer. If the defendant had continued to furnish lumber to the plaintiffs, but had refused to make a stipulation in regard to shippers' furnishing it, such as was made at other points, the case would have been entirely different, and an application to the Interstate Commerce Commission might have been proper. Until that case arises, it need not be decided.

The rigors of the Elkins law as set forth by the defendant-in-error (Brief, p. 18) may be softened for timid persons by inserting before the printed quotation the first part of the sentence, to wit: "*The willful failure* upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor," etc. Possibly the payment of the plaintiffs' claim by the defendant would not have been "a willful failure" to comply with the said statutes.

Referring to Pennsylvania R. R. Co. vs. Puritan Coal Mining Co., the defendant-in-error seeks to distinguish the present case by saying that "this is not a case where the defendant has violated its own rule," (p. 26). In this case, however, the defendant has violated the common-law, and it is not true that the common-law has been regulated or made subordinate to the provisions of the Interstate Act in any respect material to this case. For the defendant to make such an assumption is to beg the whole question. The quotation from Mr. Justice Lamar's opinion is therefore malapropos.

In Pennsylvania R. R. Co. vs. Clark Brothers Coal Mining Co., 238 U. S. 456, 471, which the defendant cites, the Mining Company had gone to the Interstate Commerce Commission and obtained a ruling that the railroad company's distribution of cars had been unjustly discriminatory against it. The question of damages was submitted in April, 1911, and on March 11, 1912, an award of $31,127.96 was made, but in January 1912, before the award was made, an action was brought in a Pennsylvania court to recover treble damages under a State statute. This court held that the Mining Company had made its election of a tribunal by proceeding before the Commission and the action in the State court could not be maintained.

Under these circumstances Mr. Justice Hughes said that the proviso in Section 22 "was not intended to nullify other parts of the Act, but to maintain existing rights which were not inconsistent with those which the statute created." As the plaintiffs' rights have been demonstrated to be "not inconsistent with those which the statute created" the decision is not an authority for the defendant but rather for the plaintiffs.

The citation by defendant-in-error from Boston & Maine Railroad vs. Hooker, 233 U. S. 97, 110, 34 U. S. Rep. 526, 527, to the effect that the Carmack amendment in the Hepburn Act had changed the rule as to limiting value by a bill of lading, has no relation to the argument in this case, (Brief p. 13). The other citations made by the defendant-in-error are equally unconvincing.

In fine, remedial legislation intended to place all shippers upon an equality and prevent unjust discrimination, has been used by the defendant to cover a new aggression upon the shippers' established rights, and to increase its own revenues at their expense. The decision under review has been used by the railroads of New York in revising their tariffs, and a wide trail of injustice has followed. While the amount directly involved in this case is not large, the vindication of sound principles is important. Shippers, instead of being obliged to bring small claims to Washington for redress, should have access to their local courts, whether such claims arise in interstate or intrastate commerce.

Dated, December 3, 1915.

EDWARD P. WHITE,

Attorney for Plaintiffs-in-Error,
921 Marine Bank Building
Buffalo, N. Y.

Edward P. White,
John Colmey,
of Counsel.

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No. 106.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1915.

LESLIE G. LOOMIS and LESLIE G. LOOMIS, Jr.
Plaintiffs-in-Error

against

LEHIGH VALLEY RAILROAD COMPANY,
Defendant-in-Error.

In Error to the Supreme Court of the
State of New York.

BRIEF FOR DEFENDANT-IN-ERROR.

INDEX

PAGE

Statement of Case........................ 1

Claims of Respective Parties............. 8

Points of Defendant-in-error............10-35

I. No question is presented for review to this court because the judgment of the Court of Appeals of New York State does not deny any right, privilege or immunity specially set up or claimed by the plaintiffs-in-error under any statute of the United States............ 10

II. The courts of the State of New York had no jurisdiction over the interstate shipments involved since Congress had legislated upon the field covering such interstate transportation and had assumed exclusive jurisdiction thereof.......................... 13

A. Provisions of the Interstate Commerce Act and Elkins Act.............. 14

Interstate Commerce Act- Section 1.
Interstate Commerce Act—Section 6.
Section 1, Elkins Act.
Interstate Commerce Act—Section 9.
Interstate Commerce Act—Section 15.

B. The courts of the State of New York have not jurisdiction to nor should this Court direct that the defendant-in-error make a payment to the plaintiffs-in-

PAGE

error in violation of the specific provisions of the Interstate Commerce Act.......... 22

C. The Interstate Commerce Commission under the Interstate Commerce Act has the exclusive jurisdiction to determine whether or not the practice of the defendant-in-error was discriminatory and unjust in failing to provide in its tariffs for allowances to shippers for lumber furnished for grain doors or bulkheads and until the Interstate Commerce Commission had acted, no Court, State or Federal, had any jurisdiction to require the Railroad to pay shippers for such lumber so furnished 25

D. Defendant after the passage of the Hepburn Act owed no common law duty to furnish grain doors and bulkheads for interstate shipments without extra charge, and consequently there is no obligation on its part to reimburse the plaintiffs for lumber furnished by them for that purpose without its request unless provisions therefor were made in its tariffs.............. 34

III. The judgment under review should be affirmed with costs to the defendant-in-error.. 35

PAGE

INDEX OF CITATIONS.

Armour Packing Co. vs. U. S., 209 U. S., 57, 72. 25

Atchison Ry. Co. vs. U. S., 232 U. S., 199..... 35

Atlantic Coast Line R. R. Co. vs. Macon Grocery Co., 166 Fed., 206 (Aff'd 215 U. S., 501) 32

B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481.......... 32

Boston & Maine Railroad vs. Hooker, 233 U. S., 97 ....13, 24

Chicago & Alton R. R. Co. vs. Kirby, 225 U. S., 155 25

Chicago, Rock Island & Pacific Ry. Co. vs. Hardwick Farmers Ry. Co., 226 U. S., 426.. 32

Cincinnati, Etc., vs. Slade, 216 U. S., 78, 83.... 12

Fowler vs. Samson, 164 U. S., 252.......... 12

Harding vs. Illinois, 196 U. S., 78, 84.......... 12

K. C. S. Ry. vs. Albers Commission Co., 223 U. S., 573.......... 25

Loeb vs. Trustees, 179 U. S., 472, 481.......... 12

Louisville & Nashville R. R. Co., vs. Mottley, 219 U. S., 467.......... 25

Mutual Life Insurance Co. vs. McGrew, 188 U. S., 291.......... 12

Mitchell Coal Co. vs. Penn. R. R. Co., 230 U. S., 247, 258-9.......... 32

McNeil vs. Southern Ry. Co., 202 U. S., 543.... 32

Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S., 304.......... 32

PAGE

National Lumber Dealers Assn. vs. Atlantic Coast Line R. R. Co., 14 I. C. C. Rep., 154.... 35

New York. New Haven & Hartford R. R. Co. vs. I. C. C., 200 U. S., 361, 391................ 25

Oxley Stave Co. vs. Butler Co., 166 U. S., 648.. 12

Penn. R. R. Co. vs. Int. Coal Mining Co., 230 U. S., 184.......................... 32

Pennsylvania R. R. Co. vs. Puritan Coal Co., 237 U. S., 121.......................... 26

Pennsylvania R. R. Co. vs. Clark Brothers Coal Mining Co., 238 U. S., 456................ 29

Pierce Co. vs. Wells Fargo Co., 236 U. S., 278.. 24

Robinson vs. B. & O. R. R. Co., 222 U. S., 506.. 32

Sayward vs. Denny, 158 U. S., 180............ 12

Southern Ry. Co. vs. Reid, 222 U. S., 424...... 32

Sweringen vs. St. Louis, 185 U. S., 38, 45...... 12

Texas & Pacific Ry. Co. vs. Abilene Oil Co., 204 U. S., 426..........................25, 32

Thomas vs. State of Illinois, 209 U. S., 258.... 12

Victor Fuel Co. vs. Atchison, Topeka & Santa Fe Ry., 14 I. C. C. Rep., 119................ 23

Zadig vs. Baldwin, 166 U. S., 485, 488......... 12

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1915

LESLIE G. LOOMIS and LESLIE G. LOOMIS, JR., *Plaintiffs-in-Error,* AGAINST LEHIGH VALLEY RAILROAD COMPANY, *Defendant-in-Error.*	NO. 106

In Error to the Supreme Court of the State of New York.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement of Case.

Although the statement of the case and statement of facts contained in the brief for plaintiffs-in-error sets forth the principal questions involved in this action, there are certain additional facts which we desire to call to the attention of this court.

The complaint of the plaintiffs-in-error alleged the delivery to defendant of certain produce for transportation and the failure of defendant to "properly and duly deliver a car in which the grain or produce could be safely, securely and properly loaded and the failure of defendant and its refusal to equip the car with necessary bin doors or bulkheads" (fols. 7-8). That the plaintiffs demanded such equipment and on the failure of defendant to furnish it, it is alleged that lumber and material necessary to furnish such bin doors or bulkheads was supplied by plaintiffs (fols. 8-9). It is for the cost of this lumber that plaintiffs-in-error seek to recover. A schedule of the various shipments concerned was attached to plaintiff's complaint, from which it appears that lumber of the value of $64.45 was used in connection with twenty-nine intrastate shipments and lumber of the value of $257.62 was used in connection with 172 interstate shipments. The proof on the trial and the stipulation of the parties concedes these facts (Schedule A, fols. 113, 117).

Defendant, by appropriate denials in its answer, put in issue the essential allegations of plaintiffs' complaint and set forth as a special defense the following (fols. 14-15):

> "VIII. That at all the times mentioned in said complaint the defendant was and still is a railroad corporation doing business between points within the State of New York and between points without the State of New York, to wit, between the States of New York, Pennsylvania, New Jersey and elsewhere, and as such corporation is subject to the Act of Congress approved February 11, 1887, known as the Interstate Commerce Act, and the several acts amendatory thereof and supplemental thereto, and is subject as well to the

> Act of Congress passed February 19, 1903, known as the Elkins Act, and the several acts amendatory thereof and supplemental thereto; that in accordance with the provisions of said Act of 1887, and the amendments thereto, the defendant, prior to November 11, 1906, filed with the Interstate Commerce Commission, in the City of Washington, its tariff naming the rates on freight, including freight of the character set forth in the complaint herein, between all points in the State of New York and many thousands of points outside of the said State, including all the points mentioned in Schedule A, annexed to the complaint; that the said tariffs named rates for transportation only, and did not provide for payments or allowances to be made for grain doors, bulkheads, or for the lumber used in making the same, placed in cars by shippers from the stations mentioned in the complaint."

At the close of the evidence offered by plaintiffs upon the trial, defendant moved for a non-suit and later moved for a direction of a verdict in its favor upon the following grounds, among others (fols. 100-104):

> "2. That this court has no judisdiction in this case of any of the interstate shipments that are involved.
>
> * * * * * * *
>
> 11. That this action is an improper action for the raising of any claim, if any, that the

plaintiff might have by reason of the furnishing of any lumber as under the circumstances of this case.

* * * * * * *

14. That the question here involved is both in respect to lumber placed on intrastate as well as interstate cars, is a question of rates, and this court has no jurisdiction to create any liability against the defendant by reason of any matters arising or connected with any of said intrastate or interstate transactions.

15. That this court has no jurisdiction to construe the meaning and terms of the provisions of the Interstate Commerce Act, where the question is involved of the meaning of Section 6 in particular of the Interstate Commerce Act, wherein, among other things, it is provided:

> 'Nor shall any carrier charge, or demand, or collect, or receive a greater or different compensation for such transportation for passengers or property, or for any service in connection therewith at the points named in such tariff, than the rate, fare and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit, in any manner or by any device, any portion of the rate, fare and charges so specified, nor extend to any shipper or person any privilege or facility in the transportation of passengers or property, except such as are specified in such tariff.'

16. That the propriety of the defendant making any reparation in any amount for grain doors on interstate shipments, has been ruled upon and order issued pursuant to the Interstate Commerce Act by the Interstate Commerce Commission in its Bulletin No. 4, paragraph 78, under date of June 1, 1908, and that this court has no jurisdiction to order any payment for any of the lumber furnished in this case by the plaintiff on any of the interstate shipments, as by virtue of the commerce clause of the Constitution of the United States, the Interstate Commerce Act and acts amendatory thereof, the jurisdiction is solely and exclusively in the jurisdiction of the Interstate Commerce Commission in the first instance, and the courts of the United States thereafter, this court having no jurisdiction to consider any of the matters involved here, relating to lumber furnished on interstate cars."

* * * * * * *

"Mr. Bass: I move for a direction of a verdict of no cause of action on the grounds stated in my motion for non-suit, and in addition that it now affirmatively appears that the question of the grain doors and bulkheads is a matter of rates, and with reference to interstate shipments under the Constitution of the United States and the Interstate Commerce Acts and acts amendatory thereof, this State Court has no jurisdiction of interstate shipments" (fol. 114).

After the motion for a non-suit was denied, the defendant proved that its tariffs between August 22d, 1906, and May 6th, 1908, at the points of origin mentioned in the complaint made no allowance to shippers for grain doors or bulkheads or lumber furnished in connection with grain or bulk shipments of produce (fols. 107-108). The dates referred to were those between which the first and last shipments involved herein were made (Ex. A, fol. 11).

Certain other tariffs were offered in evidence by plaintiffs-in-error showing that at Buffalo, Niagara Falls and other shipping points than those involved in this action, the respondent railroad, after June 22, 1907, made provisions for allowances to shippers for grain doors or bulkheads (fols. 112, 113, 124 to 129).

The plaintiffs-in-error filed statements of their claim against the respondent railroad company for the amount expended in lumber for grain doors and bulkheads. The division freight agent of the railroad in response to their first claim under date of January 2d, 1908, advised Loomis & Son in writing that their claims had been received, but "that this claim is being held up pending a conference with the legal department for the reason that grain door board allowance was not covered by an I. C. C. issue at the time the shipments were moved" (fol. 121). And later the plaintiffs-in-error were advised by the freight agent of the railroad company that the claims of Loomis & Son were rejected, "inasmuch as we have no tariff I. C. C. authority covering this question we cannot legally pay claims of this nature" (fol. 123).

The court will note that the railroad company took the broad ground that under its tariffs as filed relating to and including the ten shipping points involved in this action, its tariffs as filed and as construed by it for all shippers therefrom, made no allowances for lumber furnished by such shippers for grain doors and bulkheads (fol. 106).

The first shipment involved in this action was made August 29, 1906, and the other shipments then continued to and including May 6, 1908 (Ex. A, fol. 11). We call the court's attention to the fact that the change in the matter of allowances for grain doors and bulkheads was made by the railroad company immediately after the passage of the Hepburn Amendment to the Interstate Commerce Act which became a law on June 29, 1906, which, as we will later point out, made specific provision forbidding carriers from extending to any shipper *any privileges or facilities* in the transportation of passengers or property except such as are specified in such tariffs (fols. 73, 106).

Brief for plaintiffs-in-error in this case, on page 20, in subdivision "A," makes the following significant statement or admission:

> "Lumber in suit was part of the instrumentalities and facilities of shipment or carriage which section one required the defendant-in-error to furnish."

The cars used in the shipment of the produce in this action were the ordinary box cars in general use by railroads, of which the defendant-in-error owns some twenty to twenty-two thousand (fol.

108). A majority of the freight set forth in the official classification of all commodities shipped by railroad companies is shipped in carload lots in box cars without bulkheads or grain doors. There are hundreds of different kinds of merchandise so shipped. This is not a case where there is any claim made that the box car in and of itself, as furnished to the shipper, was unsafe or improperly constructed.

As the cars were being loaded by the plaintiffs-in-error they used lumber as an additional appliance and facility to load the car and hold the produce when so loaded, in place during transit. This lumber so used was not a permanent appliance or part of the car. As ordinarily happens, the car on its return trip might be loaded with other kinds of merchandise not requiring grain doors or bulkheads (fol. 109).

Claims of Respective Parties.

The defendant-in-error, in rejecting the claim of the plaintiffs-in-error, has at all times consistently maintained the position that it cannot pay the claims of the plaintiffs-in-error because there is no provision for an allowance for grain doors or bulkheads in its tariffs. It maintains if such refusal was illegal that the proper remedy of the plaintiffs-in-error was to make a claim for reparation before the Interstate Commerce Commission; that if the tariffs of the defendant-in-error were in any sense discriminatory, illegal or unfair in the interstate shipments involved, the Commission alone had both power to correct such discrimination or illegality and to award reparation to the shipper; that an allowance for grain doors or bin boards necessarily would affect the interstate rates of defendant-in-error, and the privileges or facilities furnished in connection therewith; that Congress has acted in respect to the jurisdiction over interstate rates and has vested the sole control over the rates, privileges and facilities either in the Interstate Commerce Commission or the courts of the United States; that since Congress has so acted the State Court has no jurisdiction to render a judgment necessarily affecting a question of rates, privileges or facilities; that to grant such an allowance as is demanded in the relief asked by plaintiffs-in-error would in effect be to give to the plaintiffs-in-error a rebate or discrimination not given to other shippers in like position; that the enforcement of and adjudging the extent of any alleged antecedent common law right of plaintiffs-in-error in such interstate shipments is taken away from State Courts and exclusively vested in the Interstate Commerce Commission or the Federal Courts, as specifically provided for in the Interstate Commerce Act.

The claim of the plaintiffs-in-error, however, as shown by their complaint and by the record, was based solely upon the alleged common law duty of the defendant to supply to them cars suitable for the particular purpose required by the plaintiffs-in-error. No claim was made in the complaint nor advanced upon the trial, nor made in any court until this appeal, that the right of plaintiffs-in-error to recover existed by virtue of Sections 1, 15 and 22 of the Interstate Commerce

Act as giving an additional remedy to the remedies prescribed in the Interstate Commerce Act itself, nor was any claim made by virtue of any other provision of the Interstate Commerce Act.

POINT I.

No question is presented for review to this court because the judgment of the Court of Appeals of New York State does not deny any right, privilege or immunity, specially set up or claimed by the plaintiffs-in-error under any statute of the United States.

The plaintiffs-in-error have at all times contended that their right to recover was based on the breach of a common law duty of the defendant to furnish to them proper and suitable cars, which included the additional facility and appliance of lumber for bulkheads or grain doors. The complaint of the plaintiffs-in-error is drawn upon this theory. There is no reference to or claim made in the complaint to any right given by a Federal statute nor to any Federal statute whatsoever.

The plaintiffs-in-error at the trial and at all times until the decision of the Court of Appeals, based their right to recover upon the common law, making no distinction as to intrastate or interstate cars. The New York State Court of Appeals, in its remittitur April 30, 1913, reduced the recovery which the plaintiffs-in-error had secured in the trial court by striking therefrom *any allowance for lumber furnished on interstate cars.*

At no place in the transcript of record filed in this court prior to the said judgment of the Court of Appeals, has any claim for any title, right, privilege or immunity under any statute of the United States been specially set up or claimed.

For the first time the plaintiffs-in-error set up such a claim in their petition for a writ of error, prepared nearly a year after the decision of the Court of Appeals (fols. 155-158).

It is the defendant-in-error that has specially set up and claimed privileges and immunities under the Interstate Commerce Act. The claim of the plaintiffs-in-error has been based upon the common law.

As we understand the rule, this court will not review a judgment of a State Court on writ of error, even where a title, right, privilege or immunity claimed under a statute of the United States is denied, unless such title, right, privilege or immunity is specially set up or claimed in the State Courts. Claims for the first time made in assignments-of-error after the decision of the highest court of the State, are made too late to raise Federal questions which this Court will review. The Federal question must appear to have been specially raised in the record. Reference may not be made to oral arguments or briefs used by plaintiffs-in-error in the State Court. None of the opinions of any of the New York courts show that plaintiffs-in-error claimed under any provisions of the Interstate Commerce Act (fols. 104, 115, 155-179).

In *Mutual Life Insurance Company vs. McGrew*, 188 U. S., 291, this Court, in delivering its opinion, said at page 308:

> "The proper way is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court. *Loeb vs. Trustees*, 179 U. S., 472, 481. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. *Sayward vs. Denny*, 158 U. S., 180; *Zadig vs. Baldwin*, 166 U. S., 485, 488."

See also:

Harding vs. Illinois, 196 U. S., 78, p. 84.
Sweringen vs. St. Louis, 185 U. S., 38, pp. 38, 45.
Cincinnati, etc. vs. Slade, 216 U. S., 78, 83.
Oxley Stave Co. vs. Butler Co., 166 U. S., 648.
Fowler vs. Samson, 164 U. S., 252.
Thomas vs. State of Illinois, 209 U. S., 258.

The various cases cited by plaintiffs-in-error upon their brief as sustaining their right to a review of the judgment in this Court are, we respectfully submit, not in point. In all of these cases it appears that the plaintiffs-in-error in this Court urged in the State Court either a Federal statute treaty or some provision of the constitution in support of their claim or defense. We find in these cases no authority for the proposition that where the plaintiffs-in-error in this Court have failed to urge or specially claim any right under a Federal statute, but have at all times denied the application of the Federal statute to the facts involved, that such plaintiffs-in-error are in position to urge a review by this court.

POINT II.

The courts of the State of New York had no jurisdiction over the interstate shipments involved since Congress had legislated upon the field covering such interstate "transportation" and had assumed exclusive jurisdiction thereof.

Rates, parts of rates, privileges, facilities and regulations affecting or determining rates, fares and charges or the value of the services rendered have the force of law and, therefore, enter into and become part of all contracts for interstate transportation. Congress has assumed exclusive jurisdiction of such subject matter and after the enactment of the Hepburn Act plaintiffs-in-error might not lawfully claim any common law rights in the field over which Congress has taken exclusive control.

In *Boston & Maine Railroad vs. Hooker*, 233 U. S., 97, the opinion of the court, at page 110 states:

> "Since the decision in the *Hughes* case, the Hepburn Act of June 29, 1906, c. 3591, 34 Stat., 584, has been passed, and this court has held that by virtue of that act (particularly § 20, the Carmack Amendment) the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation."

A. PROVISIONS OF INTERSTATE COMMERCE ACT AND ELKINS ACT.

Whatever may have been the common law obligation (this will be discussed later) of the defendant-in-error, its rights, obligations and duties with respect to these interstate shipments are now specifically regulated and determined by Congress in legislation enacted pursuant to the Commerce Clause of the United States Constitution. The obligations of defendant-in-error are now exclusively governed by the Interstate Commerce Act and by the tariffs filed pursuant thereto. We must therefore look to the Act and to the tariffs so filed to ascertain the rights, obligations and duties of the defendant with respect to these interstate shipments and lumber furnished.

In connection with these interstate shipments we desire to call the attention of the court to the change in the law which occurred at the time of the enactment of the Hepburn Act, June 29, 1906. Much is made of the testimony to the effect that prior to that time lumber had been furnished by the defendant railroad company. It was owing to the change in the law that the railroad company was unable to furnish this lumber under the tariffs in force. The law, as originally enacted, read that the tariffs printed "shall also state separately the terminal charges and any rules or regulations which in any wise change, affect or determine any part or aggregate of such aforesaid rates and fares and charges." The Hepburn Act amended this section to read as follows: "* * * shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities accorded or allowed," etc.

Before the passage of the Hepburn Act on June 29, 1906, the provision of the Interstate Commerce Act defining the term "transportation" was as follows:

> "* * * and the term 'transportation' shall include all instrumentalities of shipment or carriage." (See Fed. Ann. Statutes, Vol. 3, page 810, Sec. 1, Act of February 4, 1887.)

The Hepburn Act, passed on June 29, 1906, amending the act above referred to, broadened the scope of the former act materially and specified distinctly what the term "transportation" should include. Section 1 of the Act, as amended, reads in part as follows:

> "And the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage irrespective of ownership or of any contract, express or implied, for the use thereof and all

> services in connection with the receipt, delivery, elevation and transfer and transit, ventilation, refrigeration or icing, storage and handling of property transported."

After the passage of this act, therefore, it became unlawful to make any allowance for such lumber unless specified in the tariffs. It is to be particularly noted that this act was passed June 29, 1906, and the shipments of lumber complained of started August 29, 1906.

The Interstate Commerce Act now provides (Sec. 6) as follows:

> "That *every common carrier* subject to the provisions of this Act *shall file* with the Commission created by this Act and print and keep open to the public inspection *schedules showing all the rates, fares and charges for transportation* between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection, as aforesaid, *the separately established rates, fares, and charges applied to the through transportation.* The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and pas-

> sengers will be carried, and shall contain the classification of freight in force, *and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper or consignee.*"
>
> (The italics are ours.)

The tariffs filed with the Interstate Commerce Commission, pursuant to the above law, contain no allowance for grain doors or bulkheads furnished by the shippers at the ten shipping points involved in this action (fol. 422). Section 6 of the Interstate Commerce Act also provides:

> "No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation* of passengers *or property, or for any service in connection therewith,* between the points named in such tariffs *than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall*

> *any carrier refund or remit in any manner or or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.*"
>
> (The italics are ours.)

Section I of the Elkins Act of February 19, 1903, amending the Interstate Commerce Act, provides in part:

> "* * * and it shall be unlawful for any person, persons, or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper who shall knowingly offer, grant, or give, or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

We have in the foregoing provisions an absolute prohibition against the very thing which the plaintiffs here seek to accomplish. Under the provisions above quoted, if the defendant in error should have voluntarily made these payments, it would have been guilty of a misdemeanor and subject to prosecution criminally.

Section 9 of the Interstate Commerce Act reads in part:

> "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act, may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

Section 15 of the Interstate Commerce Act reads in part:

> "If the owner of property transported under this act, directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein. the charge and allowance therefor

> shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section."

From the foregoing sections of the Federal statutes it is clear that if a carrier furnished lumber to be used as a grain door or bulkhead, it would be furnishing an additional privilege or facility for use in connection with the receipt, delivery, transit and handling of the produce transported within the meaning of section 1 of the Interstate Commerce Act.

Further, within the meaning of section 6 of the Interstate Commerce Act, the defendant-in-error railroad company is forbidden to refund or remit to the shipper by any device whatsoever, any money for the furnishing of such a privilege or facility unless such provision is made therefor upon the tariffs of the defendant-in-error, or unless proper action therefor is taken by the Interstate Commerce Commission.

It is undisputed that the tariffs of the defendant-in-error made no such provisions for any such refund or allowances on grain doors or bulkheads at the points of shipment involved in this case, although during a considerable part of the time during which plaintiffs-in-error were making the shipments involved herein, the defendant-in-error had filed tariffs making allowances for grain doors or bulkheads furnished by shippers at other points on its line.

If plaintiffs-in-error had any common law right to recover for lumber furnished under the circumstances of this case (which we deny) prior to the provisions of the Federal statutes quoted above, this common law right had been subordinated to, qualified by and is now exclusively regulated by Congress under the duly adopted provisions of the Interstate Commerce Act. Congress, acting within its authority, has made it illegal for a railroad company to make any payment to a shipper for any privilege or facility or rate which is not specified upon its tariff. No State Court can legally direct such a payment in direct contravention of the Interstate Commerce Act.

Shippers, under the circumstances of this case, if, having a legitimate complaint, are not left without remedy under the provisions of the Interstate Commerce Act. Sections 13, 15 and 16 of the Interstate Commerce Act specifically authorize the Interstate Commerce Commission to require a railroad company that violates any provision of the Act to make reparation in damages for the injury so done to a shipper lawfully entitled to relief.

B. THE COURTS OF THE STATE OF NEW YORK HAVE NOT JURISDICTION TO NOR SHOULD THIS COURT DIRECT THAT THE DEFENDANT-IN-ERROR MAKE A PAYMENT TO THE PLAINTIFFS-IN-ERROR, IN VIOLATION OF THE SPECIFIC PROVISIONS OF THE INTERSTATE COMMERCE ACT.

There are various decisions in this and other courts which we submit sustain this proposition. The defendant-in-error is only authorized to make allowances in the matter of its rates, privileges or facilities, in accordance with the specific provisions of tariffs filed. Unless an allowance or special provision appears on the face of the tariff, a railroad company is not authorized to prefer a particular shipper in this regard. Any common law rights that shippers might have had prior to the Interstate Commerce Act must yield to and be exclusively governed by the specific provisions of the Interstate Commerce Act.

The Interstate Commerce Commission has already passed upon the question of the validity of such payments for lumber furnished for grain doors.

Conference Ruling of the Commission, No. 78, reads in part:

> "78. Grain Doors.—A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff."

(Ruling made June 1. 1908.)

Conference Ruling of the Commission, No. 19, reads:

> "19. Expense incurred in preparing cars for shipments cannot be paid by carrier

in the absence of tariff provision therefor. Not having box cars available for the movement of machinery, cattle cars were supplied at the request of the shipper, who lined them with tar paper and felt in order to protect his shipment from weather conditions. Held: That in the absence of tariff authority the carrier cannot lawfully reimburse the shipper for the expense so incurred."

(Ruling made January 6, 1908.)

E. B. Pierce: "Digest of Decisions Under Act to Regulate Commerce," pp. 790, 801.

The decision of the Commission in *Victor Fuel Co. vs. Atchison, Topeka & Santa Fe Ry.*, 14 I. C. C., Rep., 119, is well stated in the headnote as follows:

> "Upon complaint asking reparation in the sum of 50 cents per car upon car door boards furnished by complainant for use in connection with its shipments of coal in defendant's stock cars prior to the date when defendant's tariff providing for such allowance became effective. Held: That the requirement of section 6 that the schedules posted and filed shall contain 'any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee,' plainly requires publication of an allowance made to the shipper to cover the cost of car

door boards placed by the shipper in stock cars used to transport coal."

The opinion reads in part (p. 120):

> "Upon presentation by complainant of bills asking for payment upon the 50-cent basis between July 1 and October 29, 1907, defendant's legal department advised that the increased allowance could not lawfully be paid upon shipments made prior to the date when the 50-cent allowance became effective. Complainant claims that tariff publication of the allowance in question is not required by the act, and consequently defendant may lawfully pay at the 50-cent rate for car door boards supplied before the effective date of the tariff announcing the increased allowance.
>
> *This presents the question whether the allowance may lawfully be paid without provision therefor in defendant's tariffs. It seems clear to us that this question must be answered in the negative.*"
>
> (The italics are ours.)

If, then, the defendant-in-error had entered into an agreement with the plaintiffs-in-error to refund the money in question in this suit, the defendant-in-error, as well as the plaintiffs-in-error, would have been guilty of a misdemeanor and the agreement so made would have been void.

In support of the above contention see:

Boston & Maine Railroad vs. Hooker, 233 U. S., 97.

Pierce Co. vs. Wells Fargo & Co., 236 U. S., 278.

Chicago & Alton R. R. Co. vs. Kirby, 225 U. S., 155.

K. C. S. Railway vs. Albers Commission Co., 223 U. S., 573.

Armour Packing Co. vs. U. S., 209 U. S., 56, 72.

New York, New Haven & Hartford R. R. Co. vs. Interstate Commerce Commission, 200 U. S., 361, 391.

Texas & P. R. R. Co. vs. Abilene Cotton Oil Co., 204 U. S., 426.

Louisville & National R. R. Co. vs. Mottley, 219 U. S., 467.

C. THE INTERSTATE COMMERCE COMMISSION, UNDER THE INTERSTATE COMMERCE ACT, HAS THE EXCLUSIVE JURISDICTION TO DETERMINE WHETHER OR NOT THE PRACTICE OF DEFENDANT-IN-ERROR WAS DISCRIMINATORY AND UNJUST IN FAILING TO PROVIDE IN ITS TARIFFS FOR ALLOWANCES TO SHIPPERS FOR LUMBER FURNISHED FOR GRAIN DOORS OR BULKHEADS, AND, UNTIL THE INTERSTATE COMMERCE COMMISSION HAD ACTED, NO COURT, STATE OR FEDERAL, HAD ANY JURISDICTION TO REQUIRE THE RAILROAD TO PAY SHIPPERS FOR SUCH LUMBER SO FURNISHED.

In the present case the railroad company, by its general practice, interpreted and enforced its rules and tariffs alike as to all shippers not to make any allowances for lumber furnished for grain doors or bulkheads except at the points and for the shippers who were specifically provided for in their tariffs.

The practice, the general rules and provisions of tariffs of the defendant-in-error, applicable to all shipments at points from which plaintiffs-in-error shipped their products, was not to make allowances for grain doors and bulkheads. This is not a case where the railroad company has violated its own rule, and where, under the authorities, a plaintiff may maintain an action in a State Court for damages sustained thereby. Nor is this the case of enforcing in a State Court a common law right which has not been regulated by and made subordinate to the provisions of the Interstate Act.

A recent case in this court points out the distinction.

In *Pennsylvania R. R. Co. vs. Puritan Coal Co.*, 237 U. S., 121, Mr. Justice Lamar, in delivering the unanimous opinion of the Court, said, at pages 131-132:

> "There are several decisions, already cited, which hold that suits against railroads for unjust discrimination in interstate commerce can only be brought in the Federal courts. But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that

body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in Section 9.

But if the carrier's rule, fair on its face. has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the State or Federal courts."

In the *Puritan* case, above cited, the plaintiff claim was based upon the failure of the carrier to comply with its own rule. admittedly made by it, while in the case at bar the defendant-in-error claims, under its rule and tariffs, that it was not required to make an allowance for grain doors and bulkheads and, until its rules and tariffs have been declared unjust and improper by the Interstate Commerce Commission, it is entitled to continue its practice. Plaintiffs-in-error do not claim defendant-in-error is violating its own admitted rules.

Plaintiffs-in-error, since the decision of the Court of Appeals adverse to their contention now seek in this Court to sustain their right, upon the ground that it is one created by the common law, reaffirmed by-Section 1 of the Interstate Commerce Act. implied by Section 15, and preserved to them by virtue of Section 22 of said Act. We submit that this claim is without foundation, since the Interstate Commerce Act specifically requires carriers to provide in their tariffs for any allowances that they intend to make to shippers for privileges or facilities in connection with their rates, which clearly cover the furnishing of lumber under the circumstances of this case.

This provision is applicable whether the privilege or facility is furnished by the carrier or shipper, by virtue of Section 6 of the Commerce Act.

If the carrier does not make a proper allowance to the shipper, then such shipper may apply to the Interstate Commerce Commission under Section 15 of the Act. But this is not a common law right, but one specifically granted and regulated by the Interstate Commerce Act.

Any alleged antecedent common law rights of the plaintiffs-in-error are now subordinated to and exclusively regulated by the provisions of the Interstate Commerce Act, and, under those circumstances, are not preserved by Section 22 of the Interstate Commerce Act, which only provides that 'nothing in the act shall abridge common law remedies.

In *Pennsylvania R. R. Co. vs. Clark Brothers, Coal Mining Co.,* 238 U. S., 456, Mr. Justice Hughes said, in delivering the unanimous opinion of the Court, at page 471:

> "*Referring to the proviso in Section 22, with respect to the preservation of existing remedies, it was then pointed out that the proviso was not intended to nullify other parts of the act, but to maintain existing rights which were not inconsistent with those which the statute created.* And, finally, with regard to a case such as the present one, where the Commission, at the instance of the injured party, has made its ruling as to the unreasonableness or unjustly discriminatory character of the practice attacked, the court thus defined the remedy available. 'Until that body (the Commission) has declared the practice to be discriminatory and unjust, no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in Section 9." (The italics are ours.)

In other words, the claim of the plaintiffs-in-error that the common law duty asserted by them is re-affirmed by Section 1 of the Interstate Commerce Act carries with it the necessary inference that Congress has specifically acted and taken jurisdiction of any damages or right to compensation for lumber in this suit, since it is admittedly one of the instrumentalities and facilities of shipment or carriage. This being so, Section 22 of the Interstate Commerce Act saving common law "remedies" is inapplicable. A "remedy" is defined in Bouvier's Law Dictionary, Rawles Third Revision, as follows:

> "The means employed to enforce a right or redress an injury."

The preservation or the saving of a remedy to the plaintiffs-in-error by Section 22 requires as a condition precedent to its enforcement that there should be a common law right of action. Such right of action, however, cannot exist after the Hepburn amendment in matters over which the Interstate Commerce Commission has taken exclusive control and in violation of the provisions of the Act. Nor does Section 15 of the Interstate Commerce Act assist plaintiffs-in-error, since a carrier who seeks to make an allowance to a shipper for any service connected with transportation or who furnishes any instrumentalities therein, must still comply with Section 6 of the Interstate Commerce Act in stating upon its tariffs any privileges or facilities or rules or regulations under which it intends to make any allowance. If the carrier refuses to make any allowance for such a service or if either the shipper or carrier make an unreasonable allowance or charge for service furnished by the shipper, then the Commission may, after a hearing on a complaint, determine what is a reasonable charge as a maximum to be paid by the carrier or carriers for the service so rendered. This section, therefore, requires the plaintiffs-in-error to make their complaint to the Interstate Commerce Commission in the first instance before bringing any action in any court. Until the Interstate Commerce Commission has made an order under Section 15, the carrier can act only pursuant to and in accordance with its tariffs filed under Section 6 of the Interstate Commerce Act.

The common law rights of plaintiffs-in-error have been specifically changed and regulated by the Interstate Commerce Act, and because of such action, all matters in controversy in this action have by Congress been placed in the exclusive control of the Interstate Commerce Commission. Section 22 of the act, preserving a common law remedy to plaintiff, does not create or grant a right to damages or money in direct contravention of Sections 1 and 6 of the Interstate Commerce Act or a remedy different from that provided in Section 9 of said act, or grant immunity from prosecution under the Elkins Law. The Court of Appeals in this case recognized the truth of this proposition and based its opinion thereon. As Mr. Justice Werner said, in delivering the opinion:

> "Neither would it be profitable to dwell at length upon the difference contended for by plaintiff's counsel between a question of rates and a carrier's common law duty to furnish cars suitable for the traffic in which he engages. Conceding its existence and admitting the abstract soundness of the argument, the fact remains that Congress has made it a ques-

tion of rate over which the Interstate Commerce Commission has exclusive control and in respect of which any justifiable controversy is referred exclusively to the Federal courts" (Record, fol. 176).

The following decisions, we submit, sustain the above proposition that, under the facts of this case, the courts of the State of New York are without jurisdiction:

Chicago, Rock Island & Pacific Ry. Co. vs. Hardwick Farmers Railway Co., 226 U. S., 426.

Southern Ry. Co. vs. Reid, 222 U. S., 424.

Robinson vs. B. & O. R. R. Co., 222 U. S., 506.

Texas & Pacific Ry. Co. vs. Abilene Oil Co., 204 U. S., 426, 446.

McNeil vs. Southern Ry. Co., 202 U. S., 543.

B. & O. R. R. Co. vs. Pitcairn Coal Co., 215 U. S., 481.

Atlantic Coast Line R. R. Co. vs. Macon Grocery Co., 166 Fed., 206 (aff'd 215 U. S., 501).

Atchison, etc., Ry. Co. vs. U. S., 232 U. S., 199.

Mitchell *~~Nutshill~~ Coal Co. vs. Penn. R. R. Co.*, 230 U. S., 247, 258-9.

Morrisdale Coal Co. vs. Penn. R. R. Co., 230 U. S., 304.

Penn. R. R. Co. vs. Int. Coal Mining Co., 230 U. S., 184.

That the question of whether defendant-in-error railroad should make a provision on its tariffs for allowances is one which deals with a general rule and practice and not with a departure from an admitted rule, has been to all intents and purposes established by the plaintiffs-in-error in this case by their participation in a proceeding to regulate defendant-in-error's practice in reference to intrastate shipments before the Public Service Commission of the State of New York.

As is stated in the brief for plaintiffs-in-error in this Court, at page 17: "The Public Service Commission, Second District, of New York, decided the question in this case after a full investigation, to which both the plaintiffs and the defendant in this action were parties;" and then is cited the opinion of the Public Service Commission. Second District, Vol. 2, page 251, the conclusion of the said Commission, among other things, being as stated at the end of its opinion:

> "That, if the respondents see fit, for reasons of convenience and economy, to require that such device shall be supplied by shippers under a stated allowance not less than the full average cost thereof, they shall so provide in their tariffs, leaving shippers the option in such tariff provision to supply bulkheads or grain doors."

In the case at bar, plaintiffs-in-error seek to have the New York State Courts adjudge that defendant-in-error make a payment in violation of the provisions of the Interstate Commerce Act. We submit that the New York State Courts cannot lawfully direct a railroad company to rebate to a shipper for an additional privilege or facility for which it has not made provision in its tariffs.

The shipments involved in this appeal are admittedly interstate. In reference to these interstate shipments and the rules of practice of the defendant-in-error relative thereto, and the questions of the reasonableness or unreasonableness of its tariffs, plaintiffs-in-error, or any other shippers, could have made proper application to the Interstate Commerce Commission for reparation or for relief.

D. THE DEFENDANT, AFTER THE PASSAGE OF THE HEPBURN ACT, OWED NO COMMON LAW DUTY TO FURNISH GRAIN DOORS AND BULKHEADS FOR INTERSTATE SHIPMENTS WITHOUT EXTRA CHARGE, AND CONSEQUENTLY THERE IS NO OBLIGATION ON ITS PART TO REIMBURSE THE PLAINTIFFS FOR LUMBER FURNISHED BY THEM FOR THAT PURPOSE WITHOUT ITS REQUEST UNLESS PROVISIONS THEREFOR WERE MADE IN ITS TARIFFS.

The plaintiffs-in-error, having failed to offer any proof of a request, expressed or implied, on the part of the defendant-in-error that they (the plaintiffs-in-error) furnish lumber for grain doors and bulkheads, claimed that there is a common law duty upon the carrier's part to furnish such lumber and that as the plaintiffs-in-error did in fact furnish the lumber, the law will create an obligation on the defendant-in-error's part to reimburse them for the value of the lumber furnished.

We contend that there is no such duty or obligation upon the part of the carrier after the passage of the Hepburn Act effective June 29th, 1906.

We submit that the discussion and authorities cited above sustain the proposition that Congress has assumed exclusive jurisdiction of the subject matter in the issues herein involved since the expense incurred for lumber on interstate shipments is essentially a part of the rate, privileges or facilities or regulations affecting or determining rates, fares and charges or the value of the services rendered. After the enactment of the Hepburn Law the plaintiffs-in-error might not lawfully claim a common law right to damages in this case because all rights are necessarily created under and regulated by and subordinate to the provision of the Interstate Commerce Act. After June 29, 1906, a shipper had no lawful right to damages for privileges or facilities or services rendered either by the carrier or by the shipper unless provisions were made therefor upon the tariffs of the carrier filed pursuant to the Interstate Commerce Act.

Atchison, etc., Ry. Co. vs. U. S., 232 U. S., 199.

National Lumber Dealers Association vs. Atlantic Coast Line R. R. Co., 14 I. C. C. Report, 154.

See other cases *supra.*

POINT III.

The judgment under review should be affirmed with costs to the defendant-in-error.

November 29, 1915.

Respectfully submitted,

LYMAN M. BASS,
Attorney for Defendant-in-Error,
1330 Marine Bank Bldg.,
Buffalo, N. Y.

Lyman M. Bass,
Daniel J. Kenefick,
Thomas R. Wheeler,
Of Counsel.

Press of "The Buffalo Commercial."

LOOMIS v. LEHIGH VALLEY RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 106. Argued December 6, 1915.—Decided January 24, 1916.

The purpose of the Act to Regulate Commerce was to secure and preserve uniformity, and the courts may not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission.

The character of equipment which the carrier must provide and allowances which it must make for instrumentalities supplied, and services rendered, by the shipper—such as inside doors and bulkheads in cars and timber therefor—are problems which directly concern rate making and are peculiarly administrative on which there should be an appropriate inquiry by the Interstate Commerce Commission before being submitted to a court.

The opinions of the Interstate Commerce Commission on questions in regard to allowances to shippers for doors and bulkheads indicate that these problems are complicated and administrative.

THE facts, which involve the construction and application of the Act to Regulate Commerce as amended by the Hepburn Act, are stated in the opinion.

Mr. Edward P. White, with whom *Mr. John Colmey* was on the brief, for plaintiff in error:

The judgment presents a Federal question, because it is founded upon an erroneous construction of certain Federal statutes, and upon nothing else.

It was the common-law duty of the defendant to furnish the lumber in suit.

The common-law duty asserted by the plaintiffs is reaffirmed by § 1 of the Interstate Commerce Act, the liability of the defendant is necessarily implied by § 15, and the common-law remedy is expressly saved by § 22.

The common-law duty asserted in this action was enforceable at the place of shipment by the courts of New York, whatever the destination of the freight.

The alleged defense is without foundation.

The judgment under review, so far as it reverses part of the original judgment, should itself be reversed, in other respects it should be affirmed, and the original judgment should in all things be affirmed.

In support of the contentions, see *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 186; *Atlantic Coast Line* v. *Mazursky*, 216 U. S. 122; *Cook* v. *Avery*, 147 U. S. 375, 384; *Chicago, M. & St. P. Ry.* v. *Solan*, 169 U. S. 133; *Cincinnati, N. O. & T. P. Ry.* v. *Fairbanks*, 90 Fed. Rep. 467, 471; *Commercial Bank* v. *Sloman*, 121 Am. Dec. 874; *Eastern Railway* v. *Littlefield*, 237 U. S. 140; *Farron* v. *Sherwood*, 17 N. Y. 227; *Galveston &c. R. R.* v. *Wallace*, 223 U. S. 481; *Goodale* v. *Lawrence*, 88 N. Y. 513; *Hanks* v. *Mo. Pac. Ry.*, 92 Nebraska, 594; *Hilton Lumber Co.* v. *Atlantic Coast Line*, 6 L. R. A. (N. S.) 225; Hutchinson on Carriers, § 497; *Ill. Cent. R. R.* v. *McKendree*, 203 U. S. 514, 525; *Ill. Cent. R. R.* v. *Mulberry Coal Co.*, 238 U. S. 275; *Int. Comm. Com.* v. *Diffenbaugh*, 222 U. S. 42; *Louis. & Nash. R. R.* v. *Brewing Co.*, 223 U. S. 70; *Loomis* v. *Lehigh Valley R. R.*, 147 App. Div. 195; *S. C.*, 132 N. Y. Supp. 138; *No. Pac. Ry.* v. *Larabee Mills*, 211 U. S. 612; *Mo. Pac. Ry.* v. *Castle*, 224 U. S. 541; *Murdock* v. *Memphis*, 20 Wall. 590; *N. Y., N. H. & Hart. R. R.* v. *New York*, 165 U. S. 628; *Neass* v. *Mercer*, 15 Barb. 318; *Norton* v. *Coons*, 6 N. Y. 33, 40; *Nutt* v. *Knut*, 200 U. S. 12, 19; *Pearce* v. *Wabash R. R.*, 192 U. S. 179; *Penna. R. R.* v. *Puritan Coal Co.*, 237 U. S. 121; *Penna. R. R.* v. *Knight*, 171 N. Y. 354; *S. C.*, 192 U. S. 21; *Railroad Co.* v. *Davis*, 159 Illinois, 53, 58; *Roberts* v. *Ely*, 113 N. Y.

128, 131; *St. L., I. M. & So. Ry.* v. *Taylor*, 210 U. S. 281.

Mr. Lyman M. Bass, with whom *Mr. Daniel J. Kenefick* and *Mr. Thomas R. Wheeler* were on the brief, for defendant in error:

No question is presented for review to this court because the judgment of the Court of Appeals of New York State does not deny any right, privilege or immunity specially set up or claimed by the plaintiffs in error under any statute of the United States.

The courts of the State of New York had no jurisdiction over the interstate shipments involved since Congress had legislated upon the field covering such interstate transportation and had assumed exclusive jurisdiction thereof.

The courts of the State of New York have not jurisdiction to nor should this court direct that the defendant in error make a payment to the plaintiffs in error in violation of the specific provisions of the Interstate Commerce Act.

The Interstate Commerce Commission under the Interstate Commerce Act has the exclusive jurisdiction to determine whether or not the practice of the defendant in error was discriminatory and unjust in failing to provide in its tariffs for allowances to shippers for lumber furnished for grain doors or bulkheads and until the Interstate Commerce Commission had acted, no court, state or Federal, had any jurisdiction to require the railroad to pay shippers for such lumber so furnished.

Defendant after the passage of the Hepburn Act owed no common-law duty to furnish grain doors and bulkheads for interstate shipments without extra charge, and consequently there is no obligation on its part to reimburse the plaintiffs for lumber furnished by them for that purpose without its request unless provisions therefor were made in its tariffs.